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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 19[redacted]3

No. [redacted]50

MORRIS GOTTHILF, PETITIONER,

vs.

BENJAMIN SILLS, ET AL.

ON WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT

PETITION FOR CERTIORARI FILED DECEMBER 19, 1962
CERTIORARI GRANTED APRIL 1, 1963

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 673

MORRIS GOTTHILF, PETITIONER,

vs.

BENJAMIN SILLS, ET AL.

ON WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT

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[fol. 1]

IN THE
SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION—FIRST DEPARTMENT

BENJAMIN SILLS, MORTON SILLS and
SILLS OF CAMBRIDGE, INC., Plaintiffs-Respondents,

—against—

CHARGE-IT SYSTEMS, INC., Defendant,

—and—

MORRIS GOTTHILF, Defendant-Appellant.

EXCERPT FROM STATEMENT UNDER RULE 234

* * * * * * *

[fol. 3] On June 15, 1961 Archibald Palmer, Esq., filed notice of appeal to this Court on behalf of the defendants from the order of May 9, 1961 and the judgment of May 24, 1961. O. John Rogge, Esq., represented defendant-appellant on that appeal on the motion for an order before Mr. Justice Gellinoff for body execution, and represents him on this appeal. Theodore Charnas, Esq. represented and represents the plaintiffs-respondents.

[fol. 4]

IN SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

BENJAMIN SILLS, MORTON SILLS and SILLS OF CAMBRIDGE, INC., Plaintiffs,

—against—

CHARGE-IT SYSTEMS, INC. and MORRIS GOTTHILF, Defendants

NOTICE OF APPEAL—April 19, 1962

Sirs:

Please Take Notice that the individual defendant, Morris Gotthilf, hereby appeals to the Appellate Division of the Supreme Court, First Judicial Department, from an Order of Mr. Justice Abraham J. Gellinoff, entered at the office of the Clerk of the County of New York on March 26, 1960, allowing in all respects the motion of the plaintiffs for body execution against the appellant Morris Gotthilf, and from a memorandum opinion of Mr. Justice Gellinoff which appeared in the New York Law Journal February 15, 1962, page 12, column 7, in the instant case, as well as another memorandum of Mr. Justice Gellinoff which appeared in the New York Law Journal, March 14, 1962, page 12, column 5, also in the instant case, and from each and every part of the order and the two memoranda by Mr. Justice Gellinoff.

[fol. 5] Notice of the entry of the Order appealed from was served on counsel by mail and was received by counsel in the mail on the 5th day of April, 1962.

Dated: New York, New York, April 19, 1962.

O. John Rogge, Attorney for Morris Gotthilf, 44 Wall Street, New York 5, New York, DIgby 4-8444.

To:

Mr. James McGurrin, Clerk, Supreme Court, C[K]
of New York, Center & Pearl Streets, New Y[o]
New York;

Theodore Charnas, Attorney for Plaintiffs, 551 Fifth Avenue, New York 17, New York.

[fol. 6]

IN SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

ORDER APPEALED FROM—March 23, 1962

* * * * * * *

Present: Hon. Abraham V. Gellinoff, Justice.

Plaintiffs having moved for an order directing the issuance of an execution against the person of the defendant Morris Gotthilf, and said motion having duly come on to be heard on the 31st day of January, 1962.

Now on reading and filing the notice of motion dated January 15, 1962; the affidavits of Benjamin Sills and Leonard R. Berson, Esq., both verified the 12th day of January, 1962; the affidavit of Hyman Jacobs, Esq., verified the 30th day of January, 1962; the supplemental affidavit of Theodore Charnas, Esq., verified the 23rd day of February, 1962, in support thereof; and the affidavits of Morris Gotthilf and Archibald Palmer, Esq., both verified the 25th day of January, 1962, the affidavit of Morris Gotthilf, verified the 1st day of February 1962, and the additional affidavit of Morris Gotthilf, verified the 21st day of February, 1962, in opposition thereto, and upon all the pleadings and [fol. 7] proceedings heretofore had herein, and the Court having made and filed its decision in writing, after due deliberation thereon,

Now, on motion of Theodore Charnas, attorney for plaintiff herein, it is

Ordered, that the said motion be, and the same hereby is, granted in all respects, and it is further

Ordered, that execution be issued herein against the person of Morris Gotthilf, defendant herein, without notice to the said defendant.

Enter,

A. V. G., J.S.C.

[File endorsement omitted]

[fol. 8]

In Supreme Court of the State of New York

County of New York

Notice of Motion for Body Execution—January 15, 1962

Sirs:

Please Take Notice, that upon the annexed affidavit of Benjamin Sills and Leonard R. Berson, Esq., both verified the 12th day of January, 1962, and upon all the pleadings and proceedings heretofore had and filed herein, a motion will be made at a Special Term, Part I of this Court, to be held at the Courthouse #60 Centre Street, New York City, N. Y., on the 31st day of January, 1962 at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order directing the issuance of an execution against the person of defendant, Morris Gotthilf, pursuant to Article 44 and Sec. 826 of the Civil Practice Act, and for such other and further relief as to the Court may seem just and proper.

Please Take Further Notice, that answering affidavits, if any, are required to be served on plaintiffs' attorney on or before January 26th, 1962.

Dated: New York, January 15, 1962.

[fol. 9] Yours, etc.

Theodore Charnas, Attorney for Plaintiffs.

To:

Morris Gotthilf, Defendant, 300 East 57th Street, New York, N. Y.;

Archibald Palmer, Esq., 320 Broadway, New York 7, N. Y.;

O. John Rogge, Esq., 44 Wall Street, New York 5, N. Y.

[fol. 10]

IN SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

AFFIDAVIT OF BENJAMIN SILLS READ IN SUPPORT OF MOTION

State of New York,
County of New York, ss.:

Benjamin Sills, being duly sworn, deposes and says:

I am one of the plaintiffs in the above-entitled action. I make this affidavit in support of the within application for issuance of execution against the person of the individual defendant Morris Gotthilf.

On the 9th day of May, 1961 an order was duly made and entered by Hon. George M. Carney after an inquest at which defendants' attorney appeared and abruptly left, directing the entry of judgment in favor of plaintiffs against the defendants for damages for fraud and deceit in the sum of $17,408.77, together with interest, costs and disbursements.

On the 24th day of May, 1961, judgment was duly entered in the above entitled action in favor of plaintiffs against both defendants for the sum of $19,293.38, in the office of the Clerk of the County of New York.

On the 25th day of May, 1961 execution was issued upon said judgment against the property of each of the defendants out of the Supreme Court of New York County. At [fol. 11] the time of the issuance of said execution the corporate defendant had an office in the County of New York and the individual defendant resided in the County of New York, which county is the same county to which said executions were issued.

Both said executions were returned unsatisfied to the office of the Clerk of New York County by the Sheriff of New York County on June 19, 1961.

The judgment aforesaid remains wholly unpaid and unsatisfied and there remains due thereon the sum of $19,293.33 with interest from May 24, 1961.

The judgment rendered was in an action of the nature of one wherein, pursuant to Section 826 (5) of the Civil

Practice Act, a right to arrest is provided, having been an action for fraud and deceit. Defendants, who were engaged in collecting accounts receivable for plaintiffs, and who had collected large sums of money for plaintiffs, had falsely and fraudulently represented to plaintiffs verbally and in writing that defendants were remitting same to the Internal Revenue Service on behalf of plaintiffs. In reality, however, the Internal Revenue Service had never received such moneys from defendants and defendants deliberately and wrongfully misappropriated the same.

No application has been made for this or similar relief sought herein to this or any other court or judge.

Wherefore, your deponent respectfully requests that an order be made directing that an execution issue against the person of the said Morris Gotthilf, the individual defendant.

(Sworn to by Benjamin Sills on January 12, 1962.)

[fol. 12]

IN SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

AFFIDAVIT OF LEONARD R. BERSON READ IN SUPPORT OF MOTION

State of New York,
County of New York, ss.:

Leonard R. Berson, being duly sworn, deposes and says:

I am an attorney associated with the attorney for plaintiffs, and am fully familiar with all the proceedings heretofore had herein.

The judgment herein was entered on May 24, 1961, upon a single cause of action for fraud and deceit. The order directing entry of judgment was made by Hon. George M. Carney, after an inquest at which defendants appeared by their attorney, Archibald Palmer, Esq. Mr. Palmer left the proceedings before Mr. Justice Carney prior to the conclusion thereof.

On June 15, 1961, defendants appealed to the Appellate Division, First Department, from the judgment and the order directing entry of judgment. The Appellate Division

has since unanimously affirmed the order and judgment, with costs. On the appeal, defendants were represented by O. John Rogge, Esq.

[fol. 13] In view of the fact that defendant, Morris Gotthilf, has been represented by more than one attorney, during successive stages of the prior proceedings, notice of this application is being given to both Archibald Palmer, Esq., and O. John Rogge, Esq., as well as to defendant, Morris Gotthilf.

(Sworn to by Leonard R. Berson on January 12, 1962.)

[fol. 14]

IN SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

AFFIDAVIT OF HYMAN JACOBS READ IN SUPPORT OF MOTION

State of New York,
County of New York, ss.:

Hyman Jacobs being duly sworn, deposes and says:

I am an attorney-at-law and am associated with Theodore Charnas, the attorney for the plaintiffs herein. I have been duly authorized by the plaintiffs to make and submit this affidavit on their behalf.

I have been in charge of this litigation since its inception and am fully familiar with all the facts and matters referred to herein. I have in my possession the files of the plaintiffs and have discussed this matter fully with them.

The individual plaintiffs were the owners of all the stock of a firm known as Sills of Cambridge, Inc., which was in the business of manufacturing and selling men's haberdashery in the City of New York. The defendant, Charge-It Systems, Inc., was the factor of Sills of Cambridge, Inc. and Morris Gotthilf was the principal stockholder and officer of the factor.

On or about September 24, 1959 the plaintiffs desired to terminate their relationship with the factor and on that [fol. 15] day they acknowledged an obligation to the factor of $22,768.69 (for the purpose of the settlement), and

the factor acknowledged that it was holding $28,319.28 in accounts receivable.

The individual plaintiffs agreed at that time to pay to the factor $13,000. out of their personal assets, and the factor agreed, upon receipt of said sum in installment that it would discharge the plaintiffs from the balance of their obligation.

In addition to the foregoing the factor agreed to collect the accounts receivable and to turn over the proceeds to the Internal Revenue Service, which had a claim against the plaintiff corporation and the individual plaintiffs for delinquent taxes.

The $13,000. was paid in full by the individual plaintiffs on the due dates of the installments.

In the meantime, Gotthilf, the individual defendant, collected the accounts receivable and, instead of turning the proceeds over to the Internal Revenue Service as agreed, he pocketed them, and in order to allay any suspicion on the part of the plaintiffs sent them what purported to be carbon copies of pretended letters to the Internal Revenue Service enclosing payments. Needless to say, Gotthilf did not send any letters or payments to the Internal Revenue Service.

This action was started to recover damages for the fraud and deceit of the defendants.

After repeated wilful defaults on the part of the defendants, the answer of the defendants was stricken by Mr. Justice Markowitz, and the matter set down for inquest before Mr. Justice Carney.

[fol. 16] At the inquest, of which defendants received notice, their attorney appeared and although offered an opportunity to contest the plaintiffs' claim, refused to take part in the proceedings and left the court-room. After hearing the testimony of the plaintiffs and of Mr. Nathan Sprintzen, of the Internal Revenue Service, Mr. Justice Carney found for the plaintiffs in the sum of $17,408.77 damages, for defendants' fraud and deceit.

The defendants appealed to the Appellate Division, which unanimously affirmed the judgment entered in this Court.

All the arguments set forth in the moving affidavit before this Court were advanced before the Appellate Division orally and in the defendants' brief.

The plaintiffs respectfully request that the Court take judicial notice of the contents of the defendants' brief in the Appellate Division. A copy of said brief will be submitted to the Court to assist it for that purpose.

The so-called defenses of which the individual defendant claimed he was deprived are sham and specious. He now states that because of the alleged fraud of the plaintiffs in misrepresenting that if the defendants did not accept their offer they would have to go into bankruptcy, even if true, would be insufficient in law and in fact.

Defendant's own admissions in this case negative the existence of such a defense. The defendant admitted that he sent the copies of the purported letters to the plaintiffs. If the defendant claimed that he was entitled to the proceeds of the factored accounts, how could he explain the so-called letters pretending to transmit monies to the Internal Reve-
[fol. 17] nue Service? To claim that he is entitled to the monies and at the same time pretend that he had sent the money to the Internal Revenue Service clearly shows that this defense is an afterthought and has no substance whatsoever. The other defense is that his attorney acted upon a misunderstanding, which was that he thought he had an agreement with counsel for the plaintiffs, that the plaintiffs would proceed only against the corporate defendant, although he admitted advising the attorney for the plaintiffs [that it] was insolvent and out of business. Such an agreement, which in effect called for the plaintiffs' attorney selling his clients down the river, could not possibly have happened. Certainly, such an agreement, if entered into, would have been reduced to writing by counsel for the defendants, Mr. Archibald Palmer, who is known throughout the Metropolitan area for his experience in the Bankruptcy Courts. Mr. Palmer never had any such understanding or misunderstanding with the attorney for the plaintiffs.

Oddly enough, in all the subsequent proceedings in which the defendants wilfully defaulted, Mr. Palmer and his clients had notice that the plaintiffs were seeking relief against both defendants, and not only against the corporate defendant.

However, all these arguments were advanced by the defendant, Gotthilf, in the Appellate Division, and before

then, in his motion to vacate his defaults. The arguments were all struck down by the courts, and finally so by the Appellate Division.

Mr. Gotthilf stands convicted of being a common swindler. The attempts of his attorney to whitewash him failed be- [fol. 18] fore the Appellate Division and should fail in the instant proceeding. If defendant is successful in defeating this application for a body attachment, it would be difficult to visualize circumstances which could justify a body attachment.

It is therefore respectfully requested that plaintiffs' motion for a body attachment should be granted in all respects.

(Sworn to by Hyman Jacobs on January 30, 1962.)

[fol. 19]

IN SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

AFFIDAVIT OF MORRIS GOTTHILF READ IN OPPOSITION TO MOTION

State of New York,
County of New York, ss.:

Morris Gotthilf being duly sworn on oath deposes and says that:

1. I am the individual defendant in this proceeding, and I make this affidavit in opposition to a motion for body execution against me under Article 44 and Section 826 of the Civil Practice Act.

2. I had a good defense in this proceeding, but I lost it through a default order; and the default order was the result of a misunderstanding between my then attorney Archibald Palmer (whose affidavit accompanies mine), and the attorneys for the plaintiffs.

3. The plaintiff corporation and the defendant corporation entered into a factoring agreement under which the defendant corporation as factor made large advances to the plaintiff corporation. This factoring agreement was entered into years before I become associated with the

[fol. 20] defendant corporation. On September 22, 1959 there was due under this factoring arrangement from the corporate plaintiff to the corporate defendant the sum of $22,768.39, for which the corporate defendant held as collateral, accounts receivable of $28,319.28. The figure of $28,319.28 included accounts of doubtful and disputed collectability amounting to some $23,000.00. The existence of this worthless collateral plus the threat that the plaintiffs would go into bankruptcy, induced the corporate defendant to settle the amount of $22,768.39 due it for $13,000.00, thereby sustaining a loss of some $9,500.00.

4. The default order in this case was entered on November 17, 1960. It was entered against me as well as the corporate defendant. However, my then attorney Archibald Palmer thought that he had an understanding with counsel for the plaintiff, that the default order and subsequent judgment would be entered against the corporate defendant only, and not against me. After all, everything that I did, I did in my representative capacity as chairman of the board of the corporate defendant.

5. When it was discovered that the plaintiffs were proceeding against me as well as the corporate defendant, a motion was made to vacate this default order, but this motion was denied by an order of March 10, 1961.

6. Final judgment was entered against both defendants on May 24, 1961, and my then attorney Archibald Palmer filed a notice of appeal; but he failed to include in the [fol. 21] notice of appeal the order of March 10, 1961 denying the motion to set aside the default order entered against me as well as the corporate defendant. The plaintiffs in their brief in the Appellate Division accordingly made the point that "the individual defendant, Gotthilf, having failed to appeal from the order denying his motion to vacate his default, the appeal taken herein is unauthorized and in violation of Section 557 of the Civil Practice Act." The Appellate Division affirmed without opinion.

7. I am sure that Archibald Palmer, Esq. did his best, but it was not good enough; and during the course of the appeal I retained O. John Rogge, Esq. in the place and

stead of Archibald Palmer, Esq. Mr. Rogge is doing a more expeditious job, but he is handicapped by the state of the record.

8. Actually in this case, the corporate plaintiff received the large sum of $22,768.39 which it never repaid. The corporate defendant, years before I went with it, advanced large sums of money to the corporate plaintiff and received as collateral security therefor an assignment of accounts receivable of the corporate plaintiff and the personal guaranty of the individual plaintiffs herein for said loans. On or about September 22, 1959, there was due to the corporate defendant from the corporate plaintiff the sum of $22,768.39 for which the individual plaintiffs were individually liable as guarantors.

9. Approximately two months before September 22, 1959, the individual plaintiffs represented to deponent that the [fol. 22] corporate plaintiff had ceased doing business and was insolvent, and that neither the corporate plaintiff nor the individual plaintiffs had any funds with which to pay the moneys due to the corporate defendant. They further represented to deponent that in view of the fact that a tax lien had been filed by the Director of Internal Revenue in excess of $10,000 against the corporate plaintiff, that all of the plaintiffs herein would be compelled to file voluntary petitions in bankruptcy unless deponent, on behalf of the corporate defendant, agreed to accept a lesser sum in payment of the indebtedness due to the corporate defendant.

10. After a period of negotiation between the plaintiffs and the defendants, the corporate defendant agreed to accept the sum of $13,000 in settlement of the indebtedness due from the plaintiffs, with the understanding that deponent was to negotiate an agreement with the Director of Internal Revenue on behalf of the plaintiffs herein with respect to the moneys due to the government for taxes from the plaintiffs. Deponent, as a certified public accountant, had agreed to attempt to adjust these matters with the Director of Internal Revenue without remuneration, in order to assist the plaintiffs in connection with their financial troubles.

11. Thereafter, deponent learned that the representations which had been made to him by the plaintiffs with respect to their financial condition were false and that the plaintiffs had sufficient assets with which to pay their debts in full and had no intention of filing voluntary peti- [fol. 23] tions in bankruptcy. In view of these false representations, neither deponent nor the corporate defendant were, therefore, bound by the terms of the executory accord entered into between the plaintiffs and the corporate defendant herein, and the corporate defendant was entitled to retain the moneys collected from the accounts receivable which had been assigned to it up to the sum of $22,768.39, the amount admitted to be due to the corporate defendant from the plaintiffs. (All told only an aggregate of $3,663.02 was collected by the corporate defendant from these accounts receivable.)

12. In addition to the foregoing it was understood that the agreement set forth in Exhibit A annexed to the plaintiffs' complaint was contingent upon the acceptance by the Internal Revenue Service of the terms and conditions of the letter dated September 22, 1959 submitted to the Director of Internal Revenue with respect to the manner of payment of the indebtedness of the corporate plaintiff. In view of the fact that the Director of Internal Revenue subsequently rejected said offer, the condition subsequent upon which this agreement was based failed to materialize, and the agreement thereupon became null and void, and the corporate defendant was therefore no longer obliged to turn over any moneys to the Internal Revenue Service on behalf of the corporate plaintiff.

13. Both defendants had a good and meritorious defense to this action, and they were entitled to judgment on their counterclaims for moneys due the corporate de- [fol. 24] fendant from the plaintiffs. In addition, I had a further defense in that everything that I did I did in a representative capacity as chairman of the Board of Directors of the corporate defendant. Accordingly, if there was any liability running to the plaintiffs, it was from the corporate defendant and not from me individually. See for example, *Potter* v. *Muskoff*, 4 N. Y. 695 (1958), affirming 2

A.D. 2d 513 (4th Dept. 1956); *Matter of Brookside (Raybrook Textile Corp.)*, 276 App. Div. 357 (1st Dept. 1950); *Lukach* v. *Blair*, 108 Misc. 20 (Sup. Ct. N. Y. Co. 1919), aff'd 192 App. Div. 957 (1st Dept. 1920); *Hicks* v. *Haight*, 171 Misc. 151 (Sup. Ct. Nassau Co. 1939).

14. Moreover, the collateral in the form of accounts receivable given to secure the loans from the corporate defendant to the corporate plaintiff became and were worthless prior to my association with the defendant corporation. I only arranged to salvage $13,000 out of $22,768.39. In addition, the corporate defendant collected from these accounts receivable further sums aggregating $3,663.02. The corporate defendant was thus still the loser to the extent of some $6,500.00.

15. Because my former attorney, Mr. Palmer, did not keep me advised as to what was going on in this case, I never had my day in Court. He did not tell me about such things as a date for an examination before trial or court dates. My former attorney did not bring me current on what had happened until the time of the motion to vacate the default order against me as well as the corporation. If I had had my day in court I could have explained the facts [fol. 25] as I have explained them in this affidavit. I could have shown that the corporate defendant still ended up the loser to the extent of some $6,500. I could have demonstrated the worthlessness of the accounts receivable that served as collateral for the advances from the corporate defendant to the corporate plaintiff. I could have shown that the amounts which were collected from this pretty worthless collateral after September 22, 1959 aggregated the grand and miserable total of but $3,663.02.

16. Despite the fact that the final judgment of this case is the result of a mistaken default order against me individually, I nevertheless stand ready to cooperate with the Court. Despite the fact that I feel that any liability running to the plaintiffs is from the corporate defendant, and not from me individually, nevertheless I have tried and will continue to try to raise enough money to satisfy the plaintiffs.

17. I am a certified public accountant and president of the Enrolled Accountants Association of the State of New York, as well as Chairman of the Board of Governors of the Accountants Association of New York. I have served from time to time in these two capacities for the past 15 years and more. I have practiced my profession in the State of New York for more than 40 years. My home is likewise in the city, county and state of New York. I have lived here since 1910, more than a half century. The last few years have been bad years for me financially, but I have had good years in the past, and I hope to have them again. When [fol. 26] I do, I will pay the plaintiffs enough money to satisfy them.

18. I am present and available for any supplementary proceedings which the attorneys for the plaintiffs may wish to conduct, and I will continue to be present and available. I have not engaged and will not engage in any evasive or dilatory conduct in contemplation of any supplementary proceedings. On the contrary, I will be there, and I will be both cooperative and communicative. Furthermore, I stand ready to post a bond in a reasonable amount to guarantee my presence and cooperation in any supplementary proceeding which the plaintiffs may wish to conduct.

19. In an affidavit filed by one of the counsel for the plaintiffs in the Appellate Division, First Department, there is a suggestion that I fled the United States in 1961 because of judgments against me. This is a base falsehood. I was in Israel on the official invitation of the Israeli government. Moreover, I was gone for less than two months, departing this country on March 28, 1961 and returning on May 20, 1961. Since that time I have been in this country and in the city, county and state of New York, working hard to solve my problems, and I intend to continue staying right here and doing just that.

Wherefore, I respectfully request that the instant motion for body execution against me under Article 44 and Section 826 of the Civil Practice Act be wholly denied.

(Sworn to by Morris Gotthilf on January 25, 1962.)

[fol. 27]

IN SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

AFFIDAVIT OF ARCHIBALD PALMER READ IN OPPOSITION TO MOTION

State of New York,
County of New York, ss.:

Archibald Palmer, being duly sworn on oath deposes and says that:

1.- I was the attorney for the defendants herein until the time that the individual defendant Morris Gotthilf employed O. John Rogge, Esq. I am fully familiar with all of the facts and proceedings had in the trial Court in this matter and am submitting this affidavit in opposition to the motion of the plaintiffs for a body execution against the defendant Morris Gotthilf under Article 44 and Section 826 of the Civil Practice Act.

2. The affidavit of the defendant Morris Gotthilf, submitted in opposition to the instant motion for body execution indicates clearly that there was a good and meritorious defense to the instant action, and also that the individual defendant Morris Gotthilf could not have been held individually liable for the acts alleged in the complaint.

3. A perusal of the answer submitted by the defendants in the instant case will indicate clearly that a valid defense [fol. 28] was alleged and that in addition a valid counterclaim was asserted, and that this answer was interposed in good faith and not for the purpose of delay.

4. The facts and circumstances leading up to the obtaining of a default judgment against the individual defendant herein are as follows: Shortly after the service of the original answer herein, deponent communicated with the attorney for the plaintiffs and arranged an appointment with said attorney at his office between deponent, the individual defendant herein and Mr. Theodore Charnas. At said meeting deponent and Mr. Gotthilf discussed this

matter with Theodore Charnas, and the defendant Morris Gotthilf discussed the allegations of the complaint in order to prove to plaintiffs' attorney that he was not individually responsible to the plaintiffs and that there had been no improper conduct on the part of the defendants in connection with the transactions alleged in the complaint. At the conclusion of this meeting it was tentatively agreed that the corporate defendant would continue its efforts to collect the accounts receivable of the corporate plaintiff, which had been assigned to it, and would forward the proceeds to the Director of Internal Revenue. Plaintiffs' attorney had previously rejected Mr. Gotthilf's offer to turn over these accounts receivable to the plaintiffs for collection or to assign the balance of said accounts to the Director of Internal Revenue for the account of the plaintiffs.

5. After a motion had been made by the plaintiffs addressed to the original answer interposed by the defendants [fol. 29] herein, a verified amended answer was interposed on behalf of the defendants which denied the substantial allegations of the complaint and which set forth three affirmative defenses on behalf of the defendants and two counterclaims on behalf of the corporate defendant. No further motions were made with respect to the pleadings.

6. Prior to the scheduled time of the examination before trial of the defendants on October 27, 1960, deponent called the office of the attorney for the plaintiffs to obtain an adjournment of said examination due to his engagement in another matter at the scheduled time for the examination. Deponent was unable to reach plaintiffs' attorney at that time, and later in the morning deponent received a call from the office of plaintiffs' attorney and spoke to an individual whom he assumed to be Mr. Theodore Charnas. Deponent discussed the matter with said attorney and advised him that in view of the fact that the corporate defendant was insolvent and that it had been shown to said attorney that the individual defendant was not personally responsible, deponent would be willing to have judgment entered against the corporate defendant alone, and would thereupon abandon the counterclaims interposed in the verified amended answer. It was deponent's understanding that said attorney

agreed to this proposal and that the matter was to be disposed of in this manner.

7. Deponent thereafter proceeded upon the assumption that the motions made by the attorney for the plaintiffs [fol. 30] were based upon this agreement and that said attorney was merely proceeding to enter judgment against the corporate defendant. It was not until deponent was served with a copy of the order signed by the Hon. Aaron Steuer granting judgment herein and setting down the matter of inquest on February 9, 1961, together with a notice of inquest which indicated that the plaintiffs were seeking execution against the person of the individual defendant herein, that deponent realized that plaintiffs' attorney had proceeded against the individual defendant as well as the corporation, contrary to his understanding with said attorney.

8. Upon receiving these documents, deponent communicated with the attorney for the plaintiffs and inquired why said attorney had disregarded the agreement upon which deponent had permitted plaintiff's attorney to note a default in connection with the examination before trial originally scheduled for October 27, 1960. Deponent advised Mr. Theodore Charnas that in view of the fact that there were bona fide issues of fact involved in this action he could not possibly have consented to judgment against the individual defendant. Mr. Theodore Charnas replied that he had not personally handled the entry of the judgment herein and the proceedings subsequent thereto, and therefore was unable to answer deponent's inquiry. When deponent requested that Mr. Charnas vacate the judgment against the individual defendant, he was advised to make a motion for such relief.

9. It appears from the order of the Honorable Jacob Markowitz dated November 16, 1960 that the plaintiffs' mo- [fol. 31] tion to strike the amended answer and counterclaims of defendants was granted upon the representation of the counsel for plaintiffs that the defendants' counsel informed him that defendants had abandoned this case. As hereinabove shown, this representation was, at the very

least, based upon a misunderstanding on the part of plaintiffs' counsel with respect to the statements made to him by deponent on October 27, 1960, and it was never deponent's intention to abandon the defense of the action against the individual defendant herein. It is apparent that since deponent had prepared a verified answer in this proceeding which raised bona fide issues of fact, he could never have consented to the entry of a default judgment against the individual defendant. In this connection, I call to the Court's attention, as I have indicated at the outset in this affidavit, that the defendant Morris Gotthilf was not individually liable for the acts alleged in the complaint. Everything that Morris Gotthilf did he did in a representative capacity as chairman of the Board of Directors of the corporate defendant. Accordingly, any liability running to the plaintiffs was from the corporate defendant and not from the individual defendant Morris Gotthilf. See for example, *Potter* v. *Minskoff*, 4 N. Y. 695 (1958), affirming 2 A.D. 2d 513 (4th Dept. 1956); *Matter of Brookside* (*Raybrook Textile Corp.*), 276 App. Div. 357 (1st Dept. 1950); *Lukach* v. *Blair*, 108 Misc. 20 (Sup. Ct. N. Y. Co. 1919), aff'd 192 App. Div. 957 (1st Dept. 1920); *Hicks* v. *Haight*, 171 Misc. 151 (Sup. Ct. Nassau Co. 1939).

[fol. 32] Wherefore, I pray that the instant motion for a body execution against the defendant Morris Gotthilf under Article 44 and Section 826 of the Civil Practice Act be denied in its entirety.

(Sworn to by Archibald Palmer on January 25, 1962.)

[fol. 33]

IN SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

REPLY AFFIDAVIT OF MORRIS GOTTHILF READ IN OPPOSITION TO MOTION

State of New York,
County of New York, ss.:

Morris Gotthilf being duly sworn on oath deposes and says that:

1. I am the individual defendant in this proceeding and I make this affidavit in opposition to the affidavit of Hyman Jacobs.

2. This lawyer says that I stand convicted of being a common swindler. This charge is both base as well as baseless, and is of a piece with the false charge which this same lawyer made that I fled the United States in 1961 because of judgments against me, when in truth and in fact I was in Israel on the official invitation of the Israeli government, and was gone all told for less than two months, from March 21, 1961 to May 20, 1961.

3. This lawyer makes the further false charge that I pocketed money collected from the accounts receivable. I never pocketed any of these moneys. I never profited personally, and the corporate defendant is still the loser in its [fol. 34] dealings with the corporate plaintiff to the extent of some $6,500.00. In the period to which this lawyer refers in his affidavit, I did not even draw a salary from the corporate defendant.

4. This lawyer also says that I was the principal stockholder of the corporate defendant. The truth of the matter is that I was never a stockholder of the corporate defendant. The truth of the matter is that I engaged in a salvaging operation for the corporate defendant, but the corporate defendant had already made too many advances on poor collateral, such as those to the corporate plaintiff, for my attempt at a salvage operation to be successful.

(Sworn to by Morris Gotthilf on February 1, 1962.)

[fol. 35]

IN SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

ADDITIONAL AFFIDAVIT OF MORRIS GOTTHILF READ IN OPPOSITION TO MOTION

State of New York
County of New York, ss.:

Morris Gotthilf, being duly sworn on oath deposes and says that:

1. I am the individual defendant in this proceeding and I make this affidavit in response to the opportunity granted me to do so by Mr. Justice Gellinoff in his opinion in this matter, reported in The New York Law Journal, February 15, 1962.

2. I have no assets and the only income that I receive is from my business.

3. The net income (before taxes) which I received from my business for the past three years and in the current year to date is as follows:

1962 to date		$ 3,177.54
1961	Loss	(4,523.72)
1960		11,543.30
1959		19,253.18

[fol. 36] 4. As explained in my affidavit of January 25, 1962 in this matter, the last few years have been bad years for me financially, but I have had good years in the past, and I hope to have them again. I am a certified public accountant and president of the Enrolled Accountants Association of the State of New York, as well as Chairman of the Board of Governors of the Accountants Association of New York. I have served from time to time in these two capacities for the past 15 years and more. I have practiced my profession in the State of New York for more than 40 years.

5. Sometimes in the past I have had a successful refinancing which has brought me substantial income. I have some such transactions that I am working on now, but, like a lawyer with a case, I am not sure that they will be successful.

6. Concretely what I propose as a minimum is this: beginning March 1962 I will undertake to pay to the plaintiffs 25% of my net income, payable monthly on the 5th day of the following month, that is, the first payment to begin on April 5, 1962 and to continue monthly thereafter.

7. In conclusion I respectfully pray that the Court permit me to continue to try to earn all that I possibly can, for this will enable me to make payments against the judgment. I have no other means whatever of obtaining funds. If I should be incarcerated I will have to stay there, for I will then be through professionally and in the finance field where I now make most of my present limited income.

[fol. 37] 8. My heart prompts me to add two further thoughts, and they both stem from the fear that I have not appealed to Your Honor's discretion despite the fact that I have offered to do a little more than I think I can. The first thought is that if my offer of 25% of my net income is not high enough in the Court's opinion then I will try to comply with what the Court suggests it ought to be if the Court will make such a suggestion. The second thought is this: if the Court does grant the motion for the issuance of a body execution then my life is through, finished, professionally and in every other way; and in addition to this intolerable condition, I shall also have the problem of trying to persuade my attorney O. John Rogge to appeal to the Appellate Division, First Department for such an order, for as long as there is life in me I will continue to refuse to believe that in this wonderful country of ours a man can not only be deprived of his day in court but also have to go to jail, and that in a civil and not a criminal case. I know not how else to say it.

(Sworn to by Morris Gotthilf on February 21, 1962.)

[fol. 38]

IN SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

SUPPLEMENTAL AFFIDAVIT OF THEODORE CHARNAS READ IN SUPPORT OF MOTION

State of New York,
County of New York, ss.:

Theodore Charnas, being duly sworn, deposes and says:

I am the attorney for Sills Of Cambridge, Inc., the judgment-creditor and one of the plaintiffs herein. I make this affidavit in opposition to the "Additional Affidavit" of Morris Gotthilf.

In an opinion published in the New York Law Journal on February 2, 1962, the court decided that body execution would be granted unless Gotthilf, by February 21st, filed an affidavit which appealed to the discretion of the court. Gotthilf could have made such an appeal by baring his present financial status and future prospects and presenting a plan for payment of the judgment against him. Instead, Gotthilf's affidavit presents a clearly contrived method to evade that judgment.

The affidavit does not disclose Gotthilf's assets. It does not disclose the source of his income nor the existence of any contractual arrangements to which he is a party. Does Gotthilf own a house? A car?

[fol. 39] His affidavit does not reveal what he has done with his earnings since the entry of this judgment against him on May 24, 1961. What has he done with the more than $3,000. he has already earned this year? How high is his scale of living? It does not even claim that none of his assets have been diverted to others for concealment. It does not explain how he got the money to pay the passage for his recent trip to Israel, let alone his expenses there (he claims he was a guest of the Israeli Government).

Does Gotthilf give the Court his best offer? He does not. He offers twenty-five per cent of an uncertain income but is willing to go higher "if the court makes a suggestion".

Gotthilf, by his affidavit would place on the judgment-creditor the burden of pursuing him each month to determine what would be twenty-five per cent of his income. This could delay unto eternity the collection of the debt from this fraudulent debtor. Gotthilf's scheme would increase the cost of this litigation to the judgment-creditor.

Gotthilf is really saying to the judgment-creditor: Examine me repeatedly in supplementary proceedings. Prove, if you can, that I am not telling you the truth about my income and my assets. If I can force you to do this work, I will have made a mockery of your right to body execution.

The only way Gotthilf will pay the judgment against him is if a body execution issues. He had been warned that the judgment-creditor would insist on body execution if the judgment were not paid.

[fol. 40] Certainly Gotthilf's affidavit does not satisfy the conditions set down in the Court's opinion previously referred to. It is not complete. It is not candid. It presents no honest plan for payment of the judgment. It should not therefore appeal to the discretion of the Court and the judgment-creditor's motion for body execution should be granted.

(Sworn to by Theodore Charnas on February 23, 1962.)

[fol. 41]

IN SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

SUMMONS READ IN SUPPORT OF MOTION

Plaintiff designates New York County as the place of trial.

Plaintiff resides in New York County.

Plaintiffs claim defendants are liable to arrest and imprisonment in this case.

To the above named Defendants:

You Are Hereby Summoned to answer the complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's Attorney within 20 days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Dated, June 10, 1960.

Theodore Charnas, Attorney for Plaintiffs, Office and Post Office Address, 551 Fifth Avenue, Borough of Manhattan, New York 17, New York.

[fol. 42]

In Supreme Court of the State of New York

County of New York

Complaint Read in Support of Motion

Plaintiffs, complaining of the defendants, by Theodore Charnas, their attorney, respectfully allege:

For a First Cause of Action:

First: The plaintiff, Sills of Cambridge, Inc. (hereinafter called "Cambridge") is a corporation duly organized and existing under and by virtue of the laws of the State of New York.

Second: Upon information and belief, the defendant, Charge-It Systems, Inc. (hereinafter called the "Corporate Defendant") was and still is a domestic corporation, duly organized and existing under and by virtue of the laws of the State of New York.

Third: At all times herein mentioned, the plaintiffs, Benjamin Sills and Morton Sills (hereinafter called the "Individual Plaintiffs") were the sole stockholders of Cambridge and the principal officers thereof.

Fourth: Upon information and belief the defendant, Morris Gotthilf, (hereinafter called "Gotthilf") had at all [fol. 43] times mentioned herein, sole charge of the acts hereinafter mentioned of the Corporate Defendant and had the control and management of the business of the Corporate Defendant.

Fifth: Prior to September 24, 1959, Cambridge had borrowed various sums of money from the Corporate Defendant and had assigned its Accounts Receivable to the Corporate Defendant as security for the payment of such sums.

Sixth: The Individual Plaintiffs personally guaranteed the said indebtedness of Cambridge to the Corporate Defendant.

Seventh: Prior to September 24, 1959, Cambridge ceased doing business and on the said date had among its liabilities, a liability to the Internal Revenue Service of the United States Government for withholding tax and social security tax collected by Cambridge and not remitted to the said Internal Revenue Service, which liability, pursuant to Section 6672 of the Internal Revenue Code of 1954, was assessed against the Individual Plaintiffs as responsible officers of Cambridge.

Eighth: On or about September 24, 1959, the Corporate Defendant, acting through Gotthilf, entered into an agreement with plaintiffs; a copy of such agreement is annexed hereto, marked Exhibit A and incorporated herein by reference.

Ninth: On or about September 24, 1959, the Individual Plaintiffs paid to the Corporate Defendant the sum of [fol. 44] $2,500. and delivered to the Corporate Defendant their interest bearing notes in the total face amount of $10,500. in accordance with the agreement annexed hereto as Exhibit A.

Tenth: Thereafter the Corporate Defendant acted as the agent and trustee of plaintiffs to collect the said accounts receivable and to remit monthly collections to the said Internal Revenue Service in each month.

Eleventh: Plaintifrs have duly performed all the conditions to be performed on their part pursuant to the said Exhibit A and the Individual Plaintiffs had duly paid all of the notes required to be paid by them under said agreement to the date hereof.

Twelfth: Upon information and belief, the Corporate Defendant collected from the said accounts receivable between on or about September 24th, 1959 and April 30, 1960, in each month, various sums of money as set forth in the schedule hereto attached, marked Exhibit B and made part hereof, amounting in all to the sum of $3,358.16.

Thirteenth: Upon information and belief, the Corporate Defendant, in disregard of its fiduciary obligation, has wholly refused, failed and neglected to pay to the said Internal Revenue Service all or any part of the said collections of the accounts receivable.

Fourteenth: The plaintiffs have duly demanded of the defendants that the total sum of $3,358.16, being said collections from the accounts receivable, be paid to the said Internal Revenue Service.

[fol. 45] Fifteenth: Upon information and belief, the defendants have converted to their own use the said sum of $3,358.16 collected by them from the said accounts receivable.

Sixteenth: By reason of the defendants' conversion as aforesaid, plaintiffs have been damaged in the sum of $3,358.16 to the date hereof.

For a Second Cause of Action on Behalf of the Individual Plaintiffs and Against the Defendants:

Seventeenth: Repeats, reiterates and realleges each and every of the allegations contained in paragraphs "First" through "Fifteenth" hereof as though the same were fully and at length set forth herein.

Eighteenth: On or about September 24, 1959, the defendant Gotthilf, with the knowledge and consent of the Corporate Defendant and on his own behalf and on behalf of

the Corporate Defendant, falsely and fraudulently stated to the plaintiffs that the Corporate Defendant would collect the said accounts receivable of Cambridge and remit the same to the said Internal Revenue Service monthly if the Individual Plaintiffs would agree to pay to the Corporate Defendant the sum of $13,000. in installments.

Nineteenth: Defendant Gotthilf further falsely and fraudulently stated to the Individual Plaintiffs that when the said $13,000. with interest was fully paid to the Cor- [fol. 46] porate Defendant, the Corporate Defendant would give the plaintiffs a general release and turn over to the said Internal Revenue Service all of the unpaid accounts receivable of Cambridge.

Twentieth: Upon information and belief, the representations so made by the said defendant Gotthilf were false when made and were known by the defendants to be false and in truth the facts were that the defendants never intended to remit any moneys to the said Internal Revenue Service but made such representations for the purpose of wrongfully and fraudulently obtaining from the Individual Plaintiffs the sum of $13,000. plus interest, and in addition, all of the collections of the said accounts receivable.

Twenty-first: The plaintiffs believed the aforesaid representations to be true and relied upon them and the Individual Plaintiffs were thereby induced to enter into the agreement annexed hereto as Exhibit A and to pay to the Corporate Defendant the sum of $10,682.84, being the cash and notes required to be paid by the Individual Plaintiffs pursuant to such agreement to the date hereof and Cambridge was induced to permit the defendants to collect its accounts receivable.

Twenty-second: By reason of defendants' fraudulent representations as aforesaid, the Individual Plaintiffs have been damaged in the amount of $10,682.84 to the date hereof.

[fol. 47]

For a Third Cause of Action on Behalf of the Plaintiff, Cambridge, Against the Defendants:

Twenty-third: Repeats, reiterates and realleges each and every of the allegations contained in paragraphs "First" through "Twenty-first" hereof as though the same were fully and at length set forth herein.

Twenty-fourth: By reason of defendants' fraudulent representations as aforesaid, the plaintiff, Cambridge, has been damaged in the amount of $28,319.28.

For a Fourth Cause of Action on Behalf of the Individual Plaintiffs, Against the Defendants:

Twenty-fifth: Repeats, reiterates and realleges each and every of the allegations contained in paragraphs "First" through "Twenty-third" hereof as though the same were fully and at length set forth herein.

Twenty-sixth: Upon information and belief, heretofore and prior to and after the 24th day of September, 1959, the defendants conspired together and maliciously and wilfully entered into a scheme to defraud and deceive the plaintiffs and to deprive them of their money and property and formed the deliberate design and purpose to wrongfully and fraudulently obtain from the Individual Plaintiffs the sum of $13,000, plus interest, and in addition, all of the collections of the said accounts receivable of Cambridge.

[fol. 48] Twenty-seventh: Upon information and belief, in pursuance of the said conspiracy and scheme, the said defendants did all the acts and things herein alleged and all of such acts and things were participated in and done by all of the defendants or by one or both of them in pursuance of the said conspiracy and for the purpose of defrauding and deceiving the plaintiffs as hereinbefore alleged.

Twenty-eighth: Pursuant to the said conspiracy, the defendants caused the Corporate Defendant to send to the Individual Plaintiffs copies of letters which purported to be copies of letters sent to the Internal Revenue Service in each month between September 1959 and May 1960, copies

of which are annexed hereto, marked Exhibit C and incorporated herein by reference.

Twenty-ninth: Upon information and belief, the said letters, Exhibit C, were not in fact sent to the said Internal Revenue Service by the defendants or either of them.

Thirtieth: Upon information and belief, no part of the remittances set forth in the letters annexed hereto as Exhibit C were ever sent to the said Internal Revenue Service by the defendants or either of them.

Thirty-first: Upon information and belief, the said copies of the letters annexed hereto as Exhibit C were sent by the defendants to the Individual Plaintiffs with full knowledge of the aforesaid facts and with the intent and purpose of defrauding and deceiving the plaintiffs as hereinbefore alleged.

[fol. 49] Thirty-second: Plaintiffs became aware of the true facts on or about May 20, 1960, and thereupon demanded of the defendants that they pay to the Internal Revenue Service forthwith the amounts set forth in the letters annexed hereto as Exhibit C, being the total sum of $3,358.16. Defendants thereupon, in pursuance to said conspiracy, promised plaintiffs that they would immediately pay such amounts to the said Internal Revenue Service.

Thirty-third: Upon information and belief, the defendants have wholly refused, failed and neglected to pay the same to the said Internal Revenue Service and have not paid the same or any part thereof to the said Internal Revenue Service or to the plaintiffs to the date hereof.

Thirty-fourth: By reason of defendants' fraud and deceit as aforesaid, the Individual Plaintiffs have been damaged in the amount of $10,682.84 to the date hereof.

For a Fifth Cause of Action on Behalf of the Plaintiff, Cambridge, Against the Defendants:

Thirty-fifth: Repeats, reiterates and realleges each and every of the allegations contained in paragraphs "First" through "Thirty-third" hereof as though the same were fully and at length set forth herein.

Thirty-sixth: By reason of defendants' fraud and deceit as aforesaid, the plaintiff, Cambridge, has been damaged in the amount of $28,319.28.

[fol. 50] Wherefore, the Individual Plaintiffs demand judgment against the defendants in the sum of $3,358.16 on the first cause of action; and in the sum of $10,682.84 on each of the second and fourth causes of action; and the plaintiff, Cambridge, demands judgment against the defendants in the sum of $3,358.16 on the first cause of action and in the sum of $28,319.28 on each of the third and fifth causes of action; together with interest thereon and the costs and disbursements of this action.

Dated: June 10, 1960.

Theodore Charnas, Attorney for Plaintiffs.

(Verified by Benjamin Sills—June 10, 1960—Ruth Stark.)

[fol. 51]

EXHIBIT A ANNEXED TO COMPLAINT

(Agreement of September 24, 1959)

[LETTERHEAD OF]

CHARGE-IT SYSTEMS, INC.
1472 Broadway
New York 36, N. Y.

September 24, 1959

Messrs. Morton Sills and Benjamin Sills
9 East 48th Street
New York 17, New York

Gentlemen:

Re: Sills of Cambridge, Inc.

On September 22, 1959, we have submitted to the Internal Revenue Service the settlement arrangement between ourselves. The following is a verbatim copy of the settlement

agreed to between us and submitted to the Internal Revenue Service:

"We have today arranged with Morton Sills and Benjamin Sills personally, to accept on their behalf in full payment for their indebtedness to us, under their personal guaranty, $13,000.00 payable as follows:

Cash	$2,500.00	
Their notes with interest	$10,500.00	(Payable monthly)

[fol. 52] Sills represent and warrant that these funds are not and will not be corporate funds or collections from accounts receivable.

We will continue to collect the outstanding accounts receivable and report to you such collections twice a month, and remit to you such collections once a month. After the above referred-to personal notes of $10,500.00 and 6% interest are paid in full, we will give a general release to Sills of Cambridge, Inc. and the Individuals, and we will turn over to you all of the unpaid accounts receivable that we hold as collateral.

The condition of the account as of today is:

The Corporation owes to us	$22,768.39
We hold accounts receivable as collateral to secure the above (which includes accounts of doubtful and disputed collectability)	$28,319.28

In entering into the above settlement with the Sills, or agreeing to collect from the accounts receivable and remit such collections to you, we do not waive any of our rights to the collateral we now hold, or to take any and all legal action to enforce collection against or from the accounts receivable, the above Corporation and the Sills personally, if the $10,500.00 notes and interest are not paid in full.

[fol. 53] It is understood that as long as the monthly remittances are made to you, you will hold in abeyance further action against Sills of Cambridge, Inc. and the Sills personally.

Your acceptance of and agreement to this does not waive any of your rights that you may have to the accounts receivable collateral that we now hold."

We hereby acknowledge receipt of check for $2,500.00 subject to collection, and your 10 monthly personal notes aggregating $10,500.00.

Very truly yours,

CHARGE-IT SYSTEMS, INC.

M. H. GOTTHILF
Morris H. Gotthilf, Chairman
of Board of Directors

MHG/sg

Consented, agreed to and accepted
BENJAMIN SILLS
MORTON SILLS

[fol. 54]

EXHIBIT B ANNEXED TO COMPLAINT

(Payments Received)

September 1959	$402.58
October 1959	468.33
November 1959	537.43
December 1959	387.27
January 1960	144.72
February 1960	375.43
March 1960	324.68
April 1960	717.72
TOTAL	$3,358.16

[fol. 55]

EXHIBIT C ANNEXED TO COMPLAINT

October 8, 1959

Mr. Nathan Sprintzin
Chief Special Procedure Section
Post Office Box 1915
New York 17, New York

Re: Sills of Cambridge, Inc.

Dear Sir:

Pursuant to our letter of September 22, 1959, you will find enclosed herewith our check #4754 for $402.58, covering payments received in September, from the respective customers shown in the remittance reports attached hereto.

Very truly yours,

CHARGE-IT SYSTEMS, INC.

Morris H. Gotthilf, Chairman
Board of Directors

MHG/sg
cc to
Sills of Cambridge

[fol. 56]

November 6, 1959

Mr. Nathan Sprintzin
Chief Special Procedure Section
Post Office Box 1915
New York 17, New York

Re: Sills of Cambridge, Inc.

Dear Sir:

Pursuant to our letter of September 22, 1959, you will find enclosed herewith our check #4789 for $468.33, covering

payments received in October, from the respective customers shown in the remittance reports attached hereto.

Very truly yours,

CHARGE-IT SYSTEMS, INC.

Morris H. Gotthilf, Chairman
Board of Directors

MHG/sg
cc to
Sills of Cambridge

[fol. 57] December 9, 1959

Mr. Nathan Sprintzin
Chief Special Procedure Section
Post Office Box 1915
New York 17, New York

Re: Sills of Cambridge, Inc.

Dear Sir:

Pursuant to our letter of September 22, 1959, you will find enclosed herewith our check #4824 for $537.43, covering payments received in November, from the respective customers shown in the remittance reports attached hereto.

Very truly yours,

CHARGE-IT SYSTEMS, INC.

Morris H. Gotthilf, Chairman
Board of Directors

MHG/sg
cc to
Sills of Cambridge

[fol. 58] January 8, 1960

Mr. Nathan Sprintzin
Chief Special Procedure Section
Post Office Box 1915
New York 17, New York

Re: Sills of Cambridge, Inc.

Dear Sir:

Pursuant to our letter of September 22, 1959, you will find enclosed herewith our check #4868 for $387.27, covering payments received in December, from the respective customers shown in the remittance report attached hereto.

Very truly yours,

CHARGE-IT SYSTEMS, INC.

Morris H. Gotthilf, Chairman
Board of Directors

MHG/sg
cc to
Sills of Cambridge

[fol. 59] February 8, 1960

Mr. Nathan Sprintzin
Chief Special Procedure Section
Post Office Box 1915
New York 17, New York

Re: Sills of Cambridge, Inc.

Dear Sir:

Pursuant to our letter of September 22, 1959, you will find enclosed herewith our check #4970 for $144.72, covering payments received in January, from the respective customers shown in the remittance report attached hereto.

Very truly yours,

CHARGE-IT SYSTEMS, INC.

Morris H. Gotthilf, Chairman
Board of Directors

MHG/sg
cc to
Sills of Cambridge

[fol. 60] March 8, 1960

Mr. Nathan Sprintzin
Chief Special Procedure Section
Post Office Box 1915
New York 17, New York

Re: Sills of Cambridge, Inc.

Dear Sir:

Pursuant to our letter of September 22, 1959, you will find enclosed herewith our check #4989 for $375.43, covering payments received in February 1960, from the respective customers shown in the remittance report attached hereto.

Very truly yours,

CHARGE-IT SYSTEMS, INC.

Morris H. Gotthilf, Chairman
Board of Directors

MHG/sg
cc to
Sills of Cambridge

[fol. 61] April 8, 1960

Mr. Nathan Sprintzin
Chief Special Procedure Section
Post Office Box 1915
New York 17, New York

Re: Sills of Cambridge, Inc.

Dear Sir:

Pursuant to our letter of September 22, 1959, you will find enclosed herewith our check #5033 for $324.68, covering payments received in March 1960, from the respective customers shown in the remittance report attached hereto.

Very truly yours,

CHARGE-IT SYSTEMS, INC.

Morris H. Gotthilf, Chairman
Board of Directors

MHG/sg
cc to
Sills of Cambridge

[fol. 62] May 10, 1960

Mr. Nathan Sprintzin
Chief Special Procedure Section
Post Office Box 1915
New York 17, New York

Re: Sills of Cambridge, Inc.

Dear Sir:

Pursuant to our letter of September 22, 1959, you will find enclosed herewith our check #5060 for $717.72, covering payments received in April 1960, from the respective customers shown in the remittance report attached hereto.

Very truly yours,

CHARGE-IT SYSTEMS, INC.

Morris H. Gotthilf, Chairman
Board of Directors

MHG/sg
cc to
Sills of Cambridge

[fol. 63]

IN SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

AMENDED ANSWER READ IN SUPPORT OF MOTION

The defendant, Charge-It Systems, Inc., for its amended answer to the complaint herein and the defendant, Morris Gotthilf for his answer to the complaint herein, by Archibald Palmer, their attorney, respectfully allege:

1. Deny each and every allegation contained in Paragraph Fourth of the complaint herein, except admit that said Morris Gotthilf was the Chairman of the Board of Directors of the Corporate Defendant since December, 1958.

2. Deny knowledge or information sufficient to form a belief as to the allegations contained in Paragraph Fifth of the complaint, except that in December, 1958 the books and records of the Corporate Defendant indicated that prior

to September 24, 1959 Sills of Cambridge, Inc. [hereinafter referred to as the Corporate Plaintiff] had borrowed various sums of money from the Corporate Defendant and had assigned its accounts receivable to the Corporate Defendant as security for the payment of such sums.

3. Deny knowledge or information sufficient to form a belief as to the allegations contained in Paragraph Seventh of the complaint herein.

[fol. 64] 4. Deny each and every allegation contained in Paragraph Ninth of the complaint herein, except admit that on or about September 24, 1959 Benjamin Sills and Morton Sills [hereinafter referred to as the Individual Plaintiffs] paid to the Corporate Defendant the sum of $2,500.00 and delivered to the Corporate Defendant their interest bearing notes in the total face amount of $10,500.00.

5. Deny each and every allegation contained in Paragraphs Tenth, Thirteenth, Fifteenth, Sixteenth, Eighteenth, Nineteenth, Twentieth, Twenty-first, Twenty-second, Twenty-fourth, Twenty-sixth, Twenty-seventh, Twenty-eighth, Thirty-first, Thirty-fourth and Thirty-sixth of the complaint herein.

6. Deny each and every allegation contained in Paragraph Eleventh of the complaint herein, except admit that the Individual Plaintiffs paid all the notes required to be paid by them under said agreement.

7. Deny each and every allegation contained in Paragraph Fourteenth of the complaint herein, except admit that plaintiffs have demanded of the defendants that the total sum of $3,358.16 be paid to the Internal Revenue Service.

8. Deny each and every allegation contained in Paragraph Thirty-second of the complaint herein, except admit that on or about May 20, 1960 plaintiffs demanded of the defendants that they pay to the Internal Revenue Service forthwith the sum of $3,358.16.

[fol. 65] 9. Deny each and every allegation contained in Paragraph Thirty-third of the complaint herein, except admit that defendants have not paid the same or any part thereof to the Internal Revenue Service or to the plaintiffs.

As and for a First Affirmative Defense

10. That on and prior to September 24, 1959 the plaintiffs herein were indebted to the Corporate Defendant in the sum of $22,768.39 and said plaintiffs had failed and refused to pay said sum of money to the Corporate Defendant, although duly demanded.

11. That on and prior to September 24, 1959 the Corporate Defendant held various accounts receivable of the Corporate Plaintiff totaling the sum of approximately $28,319.28 as security for the payment of the said sum of $22,768.39.

12. That on or about September 22, 1959 and prior to September 24, 1959 the Corporate Defendant submitted to the Internal Revenue Service an agreement substantially in the form as set forth within quotation marks in the agreement dated September 24, 1959, marked Exhibit A annexed to the complaint.

13. That at the time of signing said agreement dated September 24, 1959, it was understood and agreed by and between the plaintiffs and the defendants herein, that the said agreement was conditioned upon acceptance by the Internal Revenue Service of the terms and conditions of [fol. 66] the agreement submitted to the Internal Revenue Service on or about September 22, 1959.

14. That it was further understood and agreed by and between the plaintiffs and defendants herein, that in the event the Internal Revenue Service refused to accept the terms of said agreement as so submitted to it, the defendants would not be obligated to turn over to the Internal Revenue Service any monies collected from the accounts receivable held by the Corporate Defendant.

15. That subsequent to September 24, 1959, the Internal Revenue Service notified the Corporate Defendant that it refused to accept the terms of said agreement.

16. That as a consequence thereof, the Corporate Defendant did not turn over to the Internal Revenue Service the sums of money collected by it on the accounts receivable which it held as collateral security.

As and for a Second Affirmative Defense and by Way of Setoff and as and for a First Counterclaim on Behalf of the Corporate Defendant

17. Defendants repeat, reiterate and reallege each and every allegation in Paragraphs 10 and 11 herein as though the same were set forth at full length herein.

[fol. 67] 18. That on and prior to September 24, 1959, the Individual Plaintiffs with the knowledge and consent of the Corporate Plaintiff and on their own behalf and on behalf of the Corporate Plaintiff falsely and fraudulently represented to the defendants that the plaintiffs herein were insolvent and unable to pay the sum of $22,768.39 then owing by the plaintiffs to the Corporate Defendant; that the Corporate Plaintiff had ceased doing business prior to that time; that plaintiffs had no assets from which the said sum of $22,768.39 or any portion thereof could be realized, but that they could borrow the sum of $13,000.00 from friends and relatives to be paid $2,500.00 in cash and the balance in nine equal monthly installments of $1,000.00 and one installment of $1,500.00 in ten months, and that if the Corporate Defendant did not accept this offer of settlement, the plaintiffs would be compelled to file voluntary petitions in bankruptcy and that in said event, the Corporate Defendant would realize little or nothing upon its claim against the plaintiffs.

19. Upon information and belief, that the representations so made by the said plaintiffs were false when made and were known by the defendants to be false and, in truth and in fact, the plaintiffs were not insolvent and did not intend to file voluntary petitions in bankruptcy and were financially able to pay said indebtedness out of their assets, and that plaintiffs made such representations for the purpose of wrongfully and fraudulently inducing the Corporate Defendant to enter into the agreement dated September 24, 1959.

[fol. 68] 20. The defendants believed the aforesaid representations to be true and relied upon said representations and the Corporate Defendant was thereby induced to enter into the agreement dated September 24, 1959.

21. That by reason of plaintiffs' said false and fraudulent representations the agreement dated September 24, 1959 is null and void and of no force and effect and there is due and owing to the Corporate Defendant from the plaintiffs the sum of $9,768.39 representing the difference between the sum of $13,000.00 paid to the Corporate Defendant and the sum of $22,768.39 owed by plaintiffs to the Corporate Defendant, together with interest thereon.

As and for a Third Affirmative Defense and by Way of Setoff and as and for a Second Counterclaim on Behalf of the Corporate Defendant

22. That prior to September 24, 1959, the Corporate Plaintiff had assigned certain accounts receivable to the Corporate Defendant without recourse and the Corporate Defendant had advanced certain monies to the plaintiff upon such collateral.

23. That the Individual Plaintiffs had executed collateral guarantees of the monies due from the Corporate Plaintiff to the Corporate Defendant in connection with said advances upon the collateral of accounts receivable.

[fol. 69] 24. Upon information and belief, that the Corporate Plaintiff received the sum of $1,365.03 in the form of returns, allowances and collections on said accounts so assigned by it to the Corporate Defendant, which it failed to account for or turn over to the Corporate Defendant.

25. That the Corporate Defendant duly demanded of the plaintiffs herein that they account for and turn over to the Corporate Defendant said sum of $1,365.03 and that the Individual Plaintiffs pay to the Corporate Defendant said sum of money in connection with the collateral guaranty so executed by them.

26. That the plaintiffs have failed and refused to pay over to the Corporate Defendant the said sum of $1,365.03 although duly demanded.

27. Upon information and belief, that the plaintiffs have converted to their own use the said sum of $1,365.03 received by them in connection with the said accounts receivable assigned to the Corporate Defendant.

28. That by reason of the foregoing the Corporate Defendant has been damaged in the sum of $1,365.03.

Wherefore, defendants demand judgment dismissing the complaint herein and judgment on the first counterclaim in the sum of $9,768.39 with appropriate interest thereon and judgment on the second counterclaim in the sum of $1,365.03 with appropriate interest thereon, together with the costs and disbursements of this action.

Archibald Palmer, Attorney for Defendants.

[fol. 70]

IN SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

REPLY TO AMENDED ANSWER

Plaintiffs for their Reply to the affirmative defense and counterclaims alleged in the Amended Answer of defendant, Charge-It Systems, Inc. and the Answer of defendant, Morris Gotthilf, respectfully allege:

1. Deny each and every allegation contained in Paragraph "10" of the Amended Answer of defendant, Charge-It Systems, Inc. and the Answer of defendant, Morris Gotthilf (hereinafter such Amended Answer and Answer are referred to as the "Answer") herein, except admit that on and prior to September 24, 1959, plaintiff, Sills of Cambridge, Inc. (hereinafter called "Cambridge") was indebted to defendant, Charge-It Systems, Inc. (hereinafter called "Corporate Defendant") and that the amount of such indebtedness was disputed between Cambridge and the Corporate Defendant, and that the plaintiffs, Benjamin Sills and Morton Sills were contingently liable upon such debt.

2. Deny each and every allegation contained in Paragraph "11" of the Answer, except admit that on and prior to September 24, 1959, the Corporate Defendant held various account receivables of Cambridge as security.

[fol. 71] 3. Deny having knowledge or information sufficient to form a belief as to the allegations contained in Paragraphs "12" and "15" of the Answer.

4. Deny each and every allegation contained in Paragraphs "13", "14", "16", "18", "19", "20", "21", "24", "25", "26", "27", and "28" of the Answer.

5. Deny each and every allegation contained in Paragraph "17" of the Answer, except as hereinbefore specifically admitted in this Reply.

Wherefore, Plaintiffs demand judgment dismissing the counterclaims set forth in the Answer and for the relief demanded in the Complaint.

Theodore Charnas, Attorney for Plaintiffs.

[fol. 72]

In Supreme Court of the State of New York

County of New York

Opinion by Mr. Justice Gellinoff—February 15, 1962

[N. Y. Law Journal—February 15, 1962]

Motion after judgment pursuant to section 764 of the Civil Practice Act for the issuance of a body execution against the individual defendant will be held in abeyance as indicated herein. Plaintiffs recovered a money judgment against both defendants and the judgment has been upheld on appeal to the Appellate Division. Plaintiffs are entitled to execution of judgment pursuant to section 504 of the Civil Practice Act. The judgments, having been entered on a cause of action for fraud and deceit—upon which plaintiffs could have availed themselves of the provisional remedy of arrest, pursuant to section 826(5) of the Civil Practice Act—execution against the person may now be granted thereon. Section 764 of the Civil Practice Act is constitutional. There is not a sufficient showing that plaintiffs have waived their right to a body execution by including a cause of action upon which a body execution allegedly could not have issued, or otherwise. All other points raised by defendant were, or should have been, raised and presumably were fully reviewed, on appeal. That possible defenses were lost through alleged inadvertence or alleged negligence on the part of former counsel, is a col-

lateral matter, as to which defendant may seek redress, as he may be advised. Although he appeals to the discretion of the court, defendant has neglected to bare completely his present financial status and future prospects, and to present any plan for payment of the judgment. The defendant will be granted an opportunity to do so by serving and filing an additional affidavit, as above indicated, on or before Feb-
[fol. 73] ruary 21, 1962. If no such affidavit is filed, or if the affidavit when filed does not appeal to the discretion of the court, the motion for the issuance of a body execution will be granted.

In Supreme Court of the State of New York

County of New York

Opinion by Mr. Justice Gellinoff—March 14, 1962

[N. Y. Law Journal—March 14, 1962]

The defendant has not convinced the court of any meritorious ground for withholding the issuance of a body execution. Accordingly, the motion is granted. Submit order.

[fol. 74] Affidavit of No Other Opinion (omitted in printing).

[fol. 75] Stipulation Waiving Certification (omitted in printing).

[fol. 76] Clerk's Certificate to foregoing transcript (omitted in printing)

[fol. 77]

IN THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT

Present—Hon. Charles D. Breitel, Justice Presiding, Hon. Benjamin J. Rabin, Hon. Francis L. Valente, Hon. Samuel W. Eager, Hon. Aron Steuer, Justices.

4987

Affirmance of Order

BENJAMIN SILLS, MORTON SILLS and SILLS OF CAMBRIDGE, INC., Plaintiffs-Respondents,

vs.

CHARGE-IT SYSTEMS, INC., Defendant,

and

MORRIS GOTTHILF, Defendant-Appellant.

ORDER OF AFFIRMANCE—September 20, 1962

An appeal having been taken to this Court by the defendant-appellant from an order of the Supreme Court, New York County, entered on the 26th day of March, 1962, granting plaintiffs' motion for an order directing the issuance of an execution against the person of defendant-appellant, and said appeal having been argued by Mr. O. John Rogge of counsel for the appellant, and by Mr. Hyman Jacobs of counsel for the respondents; and due deliberation having been had thereon,

It is hereby unanimously ordered that the order so appealed from be and the same is hereby affirmed with $20 costs and disbursements to the respondents.

ENTER:

Vincent A. Massi, Clerk.

[fol. 78] Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 79]

IN THE COURT OF APPEALS OF THE STATE OF NEW YORK

Present, Hon. Charles S. Desmond, Chief Judge, presiding.

Mo. No. 722

BENJAMIN SILLS & ors., Respondents,

vs.

CHARGE-IT SYSTEMS, INC., Defendant,

and

MORRIS GOTTHILF, Appellant.

ORDER DISMISSING MOTION FOR LEAVE TO APPEAL—
October 25, 1962

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

Ordered, that the said motion be and the same hereby is dismissed upon the ground that the order sought to be appealed from does not finally determine the action within the meaning of the Constitution.

A copy

Gearon Kimball, Deputy Clerk.

[fol. 80]

IN THE COURT OF APPEALS OF THE STATE OF NEW YORK

Present, Hon. Charles S. Desmond, Chief Judge, presiding.

Mo. No. 745

BENJAMIN SILLS & ors., Respondents,

vs.

CHARGE-IT SYSTEMS, INC., Defendant,

and

MORRIS GOTTHILF, Appellant.

ORDER GRANTING MOTION TO DISMISS APPEAL—
November 1, 1962

A motion having heretofore been made upon the part of the respondents to dismiss the appeal taken by the appellant in the above cause to this Court and papers having been submitted thereon and due deliberation having been thereupon had, it is

Ordered, that the said motion be and the same hereby is granted and the appeal dismissed, with costs and ten dollars costs of motion, upon the ground that the order sought to be appealed from does not finally determine the action within the meaning of the constitution.

A copy

Gearon Kimball, Deputy Clerk.

[fol. 81]

SUPREME COURT OF THE UNITED STATES

No. 673—October Term, 1962

MORRIS GOTTHILF, Petitioner,

vs.

BENJAMIN SILLS, ET AL.

ORDER ALLOWING CERTIORARI—April 1, 1963

The petition herein for a writ of certiorari to the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

LIBRARY
SUPREME COURT, U. S.

No. [redacted]50

Office-Supreme Court, U.S.
FILED
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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1962

MORRIS GOTTHILF,

Petitioner,

—against—

BENJAMIN SILLS, MORTON SILLS and SILLS OF CAMBRIDGE, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT

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32 CASE PRESS INC., 421 Hudson St., N. Y.—ORegon 5-4540

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IN THE

Supreme Court of the United States

October Term, 1962

No. .....

MORRIS GOTTHILF,

Petitioner,

—against—

BENJAMIN SILLS, MORTON SILLS and SILLS OF CAMBRIDGE, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT

The petitioner, Morris Gotthilf, prays that a writ of certiorari be issued to review the final order of the New York Supreme Court, Appellate Division, First Judicial Department, entered in the office of the Clerk of the Appellate Division on September 20, 1962, unanimously affirming, without opinion, an order of the Supreme Court, New York County, entered in the office of the Clerk of New York County on March 26, 1962.

Opinions Below

The New York Appellate Division, First Department, rendered no opinion. The Supreme Court, New York County, rendered two memorandum opinions, one on Febru-

ary 15, 1962, reproduced at Appendix I, *infra* pp. 16-17, and a second on March 14, 1962, reproduced in Appendix II, *infra* p. 17. These opinions are not reported.

Jurisdiction

The final order of the New York Appellate Division, First Department, was entered on September 20, 1962, reproduced as Appendix III, *infra* pp. 18-19. Thereafter the petitioner sought to appeal to the New York Court of Appeals as of right pursuant to §588(1)(a) of the New York Civil Practice Act on the ground that §764 of the Civil Practice Act as applied in the instant case violated the Fourteenth Amendment's due process clause. The respondents moved to dismiss the appeal. On November 1, 1962 the New York Court of Appeals granted the motion "upon the ground that the order sought to be appealed from does not finally determine the action within the meaning of the constitution." The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

Question Presented

Does §764 of the New York Civil Practice Act, providing for body execution, as applied in the instant case simply to enforce collection of a debt, violate the due process clause of the Fourteenth Amendment of the United States Constitution?

Constitutional and Statutory Provisions Involved

1. United States Constitution, Fourteenth Amendment, §1:

> "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *."

2. New York Civil Practice Act, §764:

> "*Issuance of execution against the person generally.* Subject to the exception specified in the next section, an execution against the person of a judgment debtor may be issued by the court or a judge or justice thereof, upon application by the judgment creditor, in a case where the judgment can be enforced by execution, as prescribed by section five hundred and four of this act, and where the plaintiff's right to arrest the defendant depends upon the nature of the action. The issuance of the execution shall rest in the discretion of such court, judge or justice. The application for the issuance of the execution may be made without notice, or with such notice as the court, judge or justice may direct, and shall be made by affidavit which shall set forth in detail the right of the party to the execution, the amount of the judgment, the amount unpaid, and the time when and place where the execution against the judgment debtor's personal property has been returned wholly or partially unsatisfied."

3. New York Civil Practice Act, §504:

> "*Enforcement of judgment by execution.* In either of the following cases a final judgment may be enforced by execution:

"1. Where it is for a sum of money in favor of either party; or directs the payment of a sum of money. * * *"

4. New York Civil Practice Act, §826:

"*Right to arrest depending upon the nature of the action.* A defendant may be arrested in an action, as provided in this and the next article, where the action is brought for either of the following causes:

1. To recover a fine or penalty.

2. To recover damages for a personal injury.

3. To recover damages for an injury to property, including the wrongful taking, detention or conversion of personal property.

4. To recover damages for misconduct or neglect in office, or in a professional employment.

5. To recover damages for fraud, or deceit. * * *"

Statement of the Case

The respondents seek a body execution "pursuant to Article 44 and Sec. 826 of the Civil Practice Act" against the petitioner Morris Gotthilf on a final judgment which resulted from a mistaken default order. Mr. Justice Abraham J. Gellinoff by an order entered at the Office of the Clerk of the Supreme Court, New York County, on March 26, 1962 allowed in all respects the motion of the respondents for body execution. The Appellate Division, First Judicial Department, by an order entered in the office of the Clerk of that Department on September 20, 1962 affirmed Mr. Justic Gellinoff's order without opinion. The New York Court of Appeals on November 1, 1962 sustained a

motion of the respondents to dismiss the petitioners appeal to that Court "upon the ground that the order sought to be appealed from does not finally determine the action within the meaning of the constitution."

In June 1960 Benjamin Sills, Morton Sills and Sills of Cambridge, Inc., brought suit against Charge-It Systems, Inc., and Morris Gotthilf, alleging fraudulent representations on the part of the defendants to the damage of the corporate plaintiff. The defendants answered, denying any fraudulent representations on their part; and setting up affirmative defenses and counterclaims which charged fraudulent representations on the part of the plaintiffs to the damage of the corporate defendant.

On November 17, 1960 Mr. Justice Jacob Markowitz entered a default order against both defendants. When it was discovered that the default order was against the individual defendant Morris Gotthilf, as well as the corporate defendant Charge-It Systems, Inc., the then attorney for the defendants, Archibald Palmer, Esq., made a motion to set aside the default, but this motion was denied in an order which was filed on March 10, 1961.

On May 9, 1961 Mr. Justice George M. Carney ordered a judgment in favor of the corporate plaintiff and against the defendants in the sum of $17,408.77 together with interest and costs; and on May 24, 1961 the clerk entered judgment in the amount of $17,408.77 plus interest in the amount of $1,697.36 and costs and disbursements of $188.25 for a total of $19,294.38.

Thereafter Mr. Palmer unfortunately added to his first mistake a second error: he failed to specify in his notice of appeal to the Appellate Division, First Department, the

order of March 10, 1961 denying the motion to set aside the default order against the individual defendant Morris Gotthilf. The plaintiffs in their brief in the Appellate Division now made the point that "the individual defendant, Gotthilf, having failed to appeal from the order denying his motion to vacate his default, the appeal taken herein is unauthorized and in violation of Section 557 of the Civil Practice Act." The Appellate Division affirmed without opinion. 15 A.D. 2d 458 (1961).

The charges and countercharges in this case have been extreme. Despite them, however, certain facts which are undisputed nevertheless emerge. The plaintiff corporation and the defendant corporation entered into a factoring agreement under which the defendant corporation as factor made large advances to the plaintiff corporation. On September 22, 1959 there was due under this factoring arrangement from the corporate plaintiff to the corporate defendant the sum of $22,768.39, for which the corporate defendant held as collateral, accounts receivable of $28,319.28. The figure of $28,319.28 included accounts of doubtful and disputed collectibility amounting to some $23,000.00. The existence of this worthless collateral plus the threat that the plaintiff would go into bankruptcy, induced the corporate defendant to settle the amount of $22,768.39 due it for $13,000.00, thereby sustaining a loss of some $9,500.00.

It is equally clear that everything which the defendant Morris Gotthilf did, he did in his representative capacity as chairman of the board of the corporate defendant, Charge-It Systems, Inc. Moreover, there is no allegation in the instant complaint that the individual defendant Morris Gotthilf acted with malice or personally profited as a result of the alleged fraudulent acts. On the contrary,

the complaint makes plain that Morris Gotthilf acted only on behalf of the corporate defendant. For instance, the complaint alleges in paragraph Eighth that "the Corporate Defendant, acting through Gotthilf, entered into an agreement with plaintiffs". On such allegations the individual defendant should not have been held liable. See, for example, *Potter* v. *Minskoff*, 4 N. Y. 695 (1958), *affirming* 2 A.D. 2d 513 (4th Dept. 1956); *Matter of Brookside (Raybrook Textile Corp.)*, 276 App. Div. 357 (1st Dept. 1950); *Lukach* v. *Blair*, 108 Misc. 20 (Sup. Ct. N. Y. Co. 1919), *aff'd* 192 App. Div. 957 (1st Dept. 1920); *Hicks* v. *Haight*, 171 Misc. 151 (Sup. Ct. Nassau Co. 1939).

As to the default entered against both defendants, their then attorney, Mr. Palmer, swears that he thought he had an understanding with counsel for the plaintiffs that judgment would be entered against the corporate defendant only:

> "Prior to the scheduled time of the examination before trial of the defendants on October 27, 1960, deponent called the office of the attorney for the plaintiffs to obtain an adjournment of said examination due to his engagement in another matter at the scheduled time for the examination. Deponent was unable to reach plaintiffs' attorney at that time, and later in the morning deponent received a call from the office of plaintiffs' attorney and spoke to an individual whom he assumed to be Mr. Theodore Charnas. Deponent discussed the matter with said attorney and advised him that in view of the fact that the corporate defendant was insolvent and that it had been shown to said attorney that the individual defendant was not personally responsible, deponent would be willing to have judgment entered against the corporate defendant alone, and would thereupon

abandon the counterclaims interposed in the verified amended answer. It was deponent's understanding that said attorney agreed to this proposal and that the matter was to be disposed of in this manner.

"Deponent thereafter proceeded upon the assumption that the motions made by the attorney for the plaintiffs were based upon this agreement and that said attorney was merely proceeding to enter judgment against the corporate defendant. It was not until deponent was served with a copy of the order signed by the Hon. Aron Steuer granting judgment herein and setting down the matter for inquest on February 9, 1961, together with a notice of inquest which indicated that the plaintiffs were seeking execution against the person of the individual defendant herein, that deponent realized that plaintiffs' attorney had proceeded against the individual defendant as well as the corporation, contrary to his understanding with said attorney.

"Upon receiving these documents, deponent communicated with the attorney for the plaintiffs and inquired why said attorney had disregarded the agreement upon which deponent had permitted plaintiff's attorney to note a default in connection with the examination before trial originally scheduled for October 27, 1960. Deponent advised Mr. Theodore Charnas that in view of the fact that there were bona fide issues of fact involved in this action he could not possibly have consented to judgment against the individual defendant. Mr. Theodore Charnas replied that he had not personally handled the entry of the judgment herein and the proceedings subsequent thereto, and therefore was unable to answer deponent's inquiry. When deponent requested that Mr. Charnas vacate the judgment against the individual defendant, he was advised to make a motion for such relief.

"It appears from the order of the Honorable Jacob Markowitz dated November 16, 1960 that the plaintiffs' motion to strike the amended answer and counter-claims of defendants was granted upon the representation of the counsel for plaintiffs that the defendants' counsel informed him that defendants had abandoned this case. As hereinabove shown, this representation was, at the very least, based upon a misunderstanding on the part of plaintiffs' counsel with respect to the statements made to him by deponent on October 27, 1960, and it was never deponent's intention to abandon the defense of the action against the individual defendant herein. It is apparent that since deponent had prepared a verified answer in this proceeding which raised bona fide issues of fact, he could never have consented to the entry of a default judgment against the individual defendant. In this connection I call to the Court's attention, as I have indicated at the outset in this affidavit, that the defendant Morris Gotthilf was not individually liable for the acts alleged in the complaint. Everything that Morris Gotthilf did, he did in a representative capacity as chairman of the Board of Directors of the corporate defendant. Accordingly, any liability running to the plaintiffs was from the corporate defendant and not from the individual defendant Morris Gotthilf."

Thus it happened that Morris Gotthilf never had his day in court. If he had had his day, he could have shown not only that everything he did, he did in a representative capacity as chairman of the board of directors of the corporate defendant; but also demonstrated the worthlessness of the accounts receivable that served as collateral for the advances from the corporate defendant to the corporate plaintiff. He could have shown that the amounts which

were collected on this pretty worthless collateral after September 22, 1959 aggregated the grand and miserable total of but $3,663.02. The corporate defendant still ended up the loser to the extent of some $6,500.00.

Nevertheless, in his affidavit in opposition to the motion of the plaintiffs for body execution against him, Morris Gotthilf stood ready to cooperate with the court and offered to post bond in a reasonable amount to guarantee his presence and cooperation in any supplementary proceeding which the plaintiffs might wish to conduct.

Mr. Justice Gellinoff was not satisfied.

Morris Gotthilf filed an additional affidavit in which he stated:

> "2. I have no assets and the only income that I receive is from my business.
>
> "3. The net income (before taxes) which I received from my business for the past three years and in the current year to date is as follows:
>
> | | |
> |---|---|
> | 1962 to date ..... | $ 3,177.54 |
> | 1961 Loss ..... | (4,523.73) |
> | 1960 " ..... | 11,543.30 |
> | 1959 " ..... | 19,253.18 |
>
> * * * * *
>
> "5. Sometimes in the past I have had a successful refinancing which has brought me substantial income. I have some such transactions that I am working on now, but, like a lawyer with a case, I am not sure that they will be successful.
>
> "6. Concretely what I propose as a minimum is this: beginning March 1962 I will undertake to pay

to the plaintiffs 25% of my net income, payable monthly on the 5th day of the following month, that is, the first payment to begin on April 5, 1962 and to continue monthly thereafter.

"7. In conclusion I respectfully pray that the Court permit me to continue to try to earn all that I possibly can, for this will enable me to make payments against the judgment. I have no other means whatever of obtaining funds. If I should be incarcerated I will have to stay there, for I will then be through professionally and in the finance field where I now make most of my present limited income.

"8. My heart prompts me to add two further thoughts, and they both stem from the fear that I have not appealed to Your Honor's discretion despite the fact that I have offered to do a little more than I think I can. The first thought is that if my offer of 25% of my net income is not high enough in the Court's opinion then I will try to comply with what the Court suggests it ought to be if the Court will make such a suggestion. The second thought is this: if the Court does grant the motion for the issuance of a body execution then my life is through, finished, professionally and in every other way; and in addition to this intolerable condition, I shall also have the problem of trying to persuade my attorney O. John Rogge to appeal to the Appellate Division, First Department from such an order, for as long as there is life in me I will continue to refuse to believe that in this wonderful country of ours a man can not only be deprived of his day in court but also have to go to jail, and that in a civil and not a criminal case. I know not how else to say it."

But Mr. Justice Gellinoff was not to be appeased.

The petitioner argued before Mr. Justice Gellinoff that the court's application of §764 of the New York Civil Practice Act made this section violative of the due process clause of the Fourteenth Amendment to the United States Constitution. But Mr. Justice Gellinoff ruled otherwise, simply saying:

> "Section 764 of the Civil Practice Act is constitutional." (App. I, p. 16)

Reason for Granting the Writ

The New York Supreme Court in applying §764 of the New York Civil Practice Act, providing for body execution, simply to enforce the collection of a debt, made this section as applied violative of the due process clause of the Fourteenth Amendment to the United States Constitution.

Late in the last century, this Court began what has become an extended and expansive application of the due process clause of the Fourteenth Amendment. This development was a natural one, for it was in accord with the historical origin and role of due process clauses. Today in this country whenever a lawyer has a case in the state courts in which he feels that his client has not been given the consideration which our current standards of fairness and decency and our regard for the individual human being require, he turns to the due process clause of the Fourteenth Amendment. The writer traced this development in his recent volume *The First and the Fifth* (1960) 59-75.

In the first term after the appearance of the writer's volume, this Court set aside state court decisions in a dozen cases because of violations of the due process clause

of the Fourteenth Amendment. In *Culombe* v. *Connecticut*, 367 U. S. 568 (1961), *Peck* v. *Pate*, 367 U. S. 433 (1961), *Rogers* v. *Richmond*, 365 U. S. 534 (1961), and *Blackburn* v. *Alabama*, 361 U. S. 199 (1960), this Court set aside state court convictions because they involved forced confessions.

In *Ferguson* v. *Georgia*, 365 U. S. 570 (1961), *Reynolds* v. *Cochran*, 365 U. S. 525 (1961), and *McNeal* v. *Culver*, 365 U. S. 109 (1961), this Court set aside state court convictions because the defendants were deprived of the effective assistance of counsel.

In addition to these decisions, the like of which occur at almost every term, this Court held in *Smith* v. *Bennett*, 365 U. S. 708 (1961), that a state cannot make the writ of habeas corpus available only to prisoners who can pay the necessary filing fees; in *Irvin* v. *Dowd*, 366 U. S. 717 (1961), that Leslie Irvin had not had a fair trial because pre-trial publicity, which labelled him as the "mad dog killer", had prejudiced the jury against him; in *Torcaso* v. *Watkins*, 367 U. S. 488 (1961), that Maryland's requirement that a state officeholder declare his belief in God was invalid; in *Marcus* v. *Search Warrants*, 367 U. S. 717 (1961), that a general state warrant for the seizure of allegedly obscene material was illegal; and in *Mapp* v. *Ohio*, 367 U. S. 643 (1961), overruling its earlier decision to the contrary in *Wolf* v. *Colorado*, 338 U. S. 25 (1949), that material illegally seized by state officers was inadmissible even in a state court proceeding.

In *Ferguson* v. *Georgia*, 365 U. S. 570 (1961), this Court held that Georgia practice which allowed a criminal defendant to make an unsworn statement but denied him the aid of his counsel's questioning while making it, unconstitutionally deprived him of the effective assistance of coun-

sel. This case arose out of the fact that Georgia retained the old common-law rule that a defendant in a criminal case could not be sworn on his own behalf. Georgia was the only state to keep this old rule. Justices Frankfurter and Clark would have gone further than the rest of the Court: they would have held that this old rule, which Mr. Justice Clark characterized "as an unsatisfactory remnant of an age gone by", violated the Fourteenth Amendment's due process clause.

If the old common-law rule, centuries old, that a defendant in a criminal case could not be sworn on his own behalf, is now the basis for a violation of the Fourteenth Amendment's due process clause, then it is submitted that §764 of the New York Civil Practice Act, providing for body execution, as applied in the instant case simply to enforce the collection of a debt, likewise now violates this clause.

The New York Court of Appeals dismissed the appeal in the instant case "upon the ground that the order sought to be appealed from does not finally determine the action within the meaning of the constitution." But Mr. Justice Gellinoff's order, the one that the Appellate Division, First Department, affirmed without opinion, and the order which forms the basis for the instant petition, concluded:

> "ORDERED, that execution be issued herein against the person of Morris Gotthilf, defendant herein, without notice to the said defendant."

Surely the petitioner does not have to wait until he is in a debtors' prison, and then by writ of habeas corpus test the constitutionality of §764 of the New York Civil Practice Act, as applied in the instant case.

CONCLUSION

It is unbecoming a free people for a judge to be able to say to a defendant in a civil case, involving a civil debt, that the defendant either pay it all or go to jail. The instant petition for a writ of certiorari should be granted.

Respectfully submitted,

O. JOHN ROGGE
Attorney for Petitioner
60 Broad Street
New York 4, New York

APPENDIX I

Opinion by Mr. Justice Gellinoff at Special Term

[New York Law Journal—February 15, 1962]

Motion after judgment pursuant to section 764 of the Civil Practice Act for the issuance of a body execution against the individual defendant will be held in abeyance as indicated herein. Plaintiffs recovered a money judgment against both defendants and the judgment has been upheld on appeal to the Appellate Division. Plaintiffs are entitled to execution of judgment pursuant to section 504 of the Civil Practice Act. The judgment, having been entered on a cause of action for fraud and deceit—upon which plaintiffs could have availed themselves of the provisional remedy of arrest, pursuant to section 826(5) of the Civil Practice Act—execution against the person may now be granted thereon. Section 764 of the Civil Practice Act is constitutional. There is not a sufficient showing that plaintiffs have waived their right to a body execution by including a cause of action upon which a body execution allegedly could not have issued, or otherwise. All other points raised by defendant were, or should have been, raised and presumably were fully reviewed, on appeal. That possible defenses were lost through alleged inadvertence or alleged negligence on the part of former counsel, is a collateral matter, as to which defendant may seek redress, as he may be advised. Although he appeals to the discretion of the court, defendant has neglected to bare completely his present financial status and future prospects, and to present any plan for payment of the judgment. The defendant will be

granted an opportunity to do so by serving and filing an additional affidavit, as above indicated, on or before February 21, 1962. If no such affidavit is filed, or if the affidavit when filed does not appeal to the discretion of the court, the motion for the issuance of a body execution will be granted.

APPENDIX II

Opinion by Mr. Justice Gellinoff at Special Term

[New York Law Journal—March 14, 1962]

The defendant has not convinced the court of any meritorious ground for withholding the issuance of a body execution. Accordingly, the motion is granted. Submit order.

APPENDIX III

Order of Affirmance of Appellate Division, First Department

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 20th day of September, 1962.

Present:

HON. CHARLES D. BREITEL,
Justice Presiding,
" BENJAMIN J. RABIN,
" FRANCIS L. VALENTE,
" SAMUEL W. EAGER,
" ARON STEUER,
Justices.

4987

BENJAMIN SILLS, MORTON SILLS and SILLS OF CAMBRIDGE, INC.,

Plaintiffs-Respondents,

—v.—

CHARGE-IT SYSTEMS, INC.,

Defendant,

and

MORRIS GOTTHILF,

Defendant-Appellant.

Appendix III

Affirmance of Order

An appeal having been taken to this Court by the defendant-appellant from an order of the Supreme Court, New York County, entered on the 26th day of March, 1962, granting plaintiffs' motion for an order directing the issuance of an execution against the person of defendant-appellant, and said appeal having been argued by Mr. O. John Rogge of counsel for the appellant, and by Mr. Hyman Jacobs of counsel for the respondents; and due deliberation having been had thereon,

It is hereby unanimously ordered that the order so appealed from be and the same is hereby affirmed with $20 costs and disbursements to the respondents.

Enter:

Vincent A. Massi
Clerk

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MAR 2 0 1963
JOHN F. DAVIS, CLERK

No. [redacted] 50

IN THE

Supreme Court of the United States

1963

MORRIS GOTTHILF,

Petitioner,

—against—

BENJAMIN SILLS, MORTON SILLS and SILLS OF CAMBRIDGE, INC.,

Respondents.

ANSWER OF RESPONDENTS TO PETITIONER'S APPLICATION FOR WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

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IN THE

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—against—

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Respondents.

ANSWER OF RESPONDENTS TO PETITIONER'S APPLICATION FOR WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

Statement

The petitioner, Morris Gotthilf, has petitioned this Court that a Writ of Certiorari be issued to review the final order of the New York Supreme Court, Appellate Division, First Judicial Department, entered in the office of the Clerk of the Appellate Division on September 20, 1962, unanimously affirming without opinion an order of the Supreme Court, New York County, entered in the office of the Clerk of New York County on March 26, 1962. Opinion below.

Respondents respectfully refer this Court to petitioner's Appendix I, pages 16-17, and Appendix II, pages 17, where the memorandum opinions of the Supreme Court of the State of New York, County of New York in this matter are set forth at length.

Constitutional and Statutory Provisions Involved:

The relevant New York State statutes are reproduced on page 3 of the petition, said statutes being New York Civil Practice Act, Section 764, the New York State Civil Practice Act, Section 504, and the New York State Civil Practice Act, Section 826.

Petitioner is seeking review of Section 764 of the Civil Practice Act on the ground that its application in this case is in violation of the due process clause of the 14th Amendment of the United States Constitution.

Statement of the Case

In September, 1959, petitioner was the Chairman of the Board of Charge-It Systems, Inc., a New York corporation, which was the factor of respondent, Sills of Cambridge, Inc. Respondents Benjamin Sills and Morton Sills were the principal officers and stockholders of Sills of Cambridge, Inc.

On September 24, 1959, the respondents were indebted to the United States Government for withholding taxes collected from its employees. The individual respondents, in addition to being personally liable for the debt to the United States Government, were also the guarantors of the debt of Sills of Cambridge, Inc. to Charge-It Systems, Inc. There was a controversy between the parties as to the balance due to Charge-It Systems.

On September 24, 1959, Charge-It Systems, Inc., by its Chairman of the Board, agreed with the individual respondents that it would satisfy in full, the claim of Charge-It Systems against the respondents, if the individual defend-

ants would pay the sum of $13,000. to it, by paying $2,500. and the balance in ten equal monthly payments. The petitioner assured the respondents that he had communicated with Internal Revenue Service and had stated to it that he would satisfy the claims of Charge-It Systems against the respondents by reason of such payment of $2,500 and the ten monthly installments, and that he would collect the outstanding accounts receivables of Sills of Cambridge, Inc. and would remit to the Internal Revenue Service the collections, once a month, and would report such collections to it twice a month. This agreement was incorporated in a letter signed by the parties, including the petitioner. (Appendix I.)

The payment of $2,500. and the montly payments were all made by the individual respondents when they fell due.

The petitioner collected the acounts receivable and instead of reporting and remitting such collections to the Internal Revenue Service once a month, sent to Sills of Cambridge, Inc. what appeared to be copies of letters addressed by the petitioner to the Internal Revenue Service, remitting to it the amount of collections received during each preceding month. Actually and in fact, the copies of the letters were fraudulent. Petitioner did not remit payments to the Internal Revenue Service and, in fact, had not even approached the Internal Revenue Service with its agreement of September 24, 1959. The agreement of September 24, 1959 and the purported copies of the monthly letters were a fraudulent plan by the petitioner to obtain the sum of $13,000. from the individual respondents on the pretext that all collections of the accounts receivables would be paid to the Internal Revenue Service in reduction of its claim against the respondents.

A summons and verified complaint was served upon Charge-It Systems and the petitioner alleged in one of the causes of action an action for fraud and deceit. The defendants in that action were required to appear for an examination before trial. They deliberately defaulted. A motion was made on written notice to their attorney for an order striking their answer on the ground of their wilful and deliberate default in appearing for the examination before trial. Again, the petitioner and his co-defendant deliberately and wilfully defaulted. The motion was granted and a copy of the order entered thereon was served upon petitioner's attorney, who did nothing with regard thereto.

Thereafter, a motion was made to set the case down for an inquest before the court. This motion was also made on written notice to petitioner's counsel. Again, petitioner's counsel deliberately defaulted.

The petitioner's counsel appeared at the inquest taken on the 9th day of May, 1961, and notified the Justice Presiding that he would not take part therein and left the courtroom. The Presiding Justice heard the testimony and evidence of the respondents with regard to the fraud and deceit practiced upon them by Charge-It Systems, Inc. and petitioner and thereupon granted judgment to the respondent, Sills of Cambridge, Inc. against petitioner herein and his co-defendant, in the sum of $19,294.38, by reason of the fraud and deceit of both the petitioner and his co-defendant, ~~Sills of Cambridge, Inc.~~ CHARGE-IT SYSTEMS, INC.

An appeal was taken therefrom to the Appellate Division of the State of New York, First Department, and the judgment was upheld without opinion.

An execution was issued against the property of the petitioner and his co-defendant. The execution was returned unsatisfied. Thereafter, the judgment-creditor by written notice served upon the petitioner, his former attorney, Archibald Palmer and his present attorney, O. John Rogge, brought on a motion for a body execution. The motion was heard on January 31, 1962 in the Supreme Court, New York County, Special Term, Part I by Mr. Justice Abraham J. Gellinoff presiding. Affidavits were submitted in support of said motion and the petitioner submitted three affidavits verified by him and one affidavit verified by Archibald Palmer, his former attorney. The court was not satisfied with the affidavits submitted in opposition to said motion and required the petitioner to serve an additional affidavit setting forth his financial status and future prospects, together with a plan for the payment of the judgment. (See Appendix I, page 16 annexed to the petition.)

Petitioner did, in fact, submit an additional affidavit and also requested a hearing before Mr. Justice Gellinoff. He was granted a hearing, at which time the petitioner, his attorney O. John Rogge, and Theodore Charnas the attorney for the judgment-creditor appeared.

Thereafter, the court granted respondent's application for a body attachment.

Petitioner appealed to the Appellate Division on the ground, among others, that the Section 764 of the Civil Practice Act of the State of New York was unconstitutional. The Appellate Division affirmed the decision of the lower court.

The Reasons for Denying the Writ

The New York Supreme Court had a right to issue body execution against the petitioner herein because it had extended to petitioner due process, which was rejected in part, and because the Legislature of the State of New York had set the procedure by which rights in such cases may be enforced and wrongs remedied.

> *The Hardware Dealer's Mut. Fire Ins. Co. of Wisc.* v. *Glidden Co.*, 1931, 52 S. Ct. 69, 284 U. S. 151, 76 L. Ed. 214.

The procedure prescribed by New York State for the issuance of body attachments, in cases where damages are sought for fraud and deceit, affords due process contemplated by the 14th Amendment.

Petitioner, in the New York case, had notice of every step taken in the action, which resulted in the judgment for damages for fraud and deceit. The fact that the petitioner refused to accept the due process available to him cannot afford him immunity from body attachment.

> *Mueller* v. *Powell, C. A. Mo.* 1953, 203 F. 2nd 797.

In the case of *Lipman* v. *Goebel*, 192 N. E. 203, 357 Ill. 315 certiorari was denied by this Court. 55 S. Ct. 508, 294 U. S. 712, 79 L. Ed. 1246.

The facts in *Lipman* are very similar to those in the case before this Court. In both cases, a writ of attachment was sought where a malicious tort was the basis of the action.

CONCLUSION

Petitioner's writ of certiorari should be denied because Section 764 of the Civil Practice Act of the State of New York is constitutional.

Respectfully submitted,

THEODORE CHARNAS
Attorney for Respondents
Office & P. O. Address
551 Fifth Avenue
New York 17, N. Y.

APPENDIX I

Exhibit A Annexed to Complaint

(Agreement of September 24, 1959)

[LETTERHEAD OF]

CHARGE-IT SYSTEMS, INC.
1472 Broadway
New York 36, N. Y.

September 24, 1959

Messrs. Morton Sills and Benjamin Sills
9 East 48th Street
New York 17, New York
Gentlemen:

Re: Sills of Cambridge, Inc.

On September 22, 1959, we have submitted to the Internal Revenue Service the settlement arrangement between ourselves. The following is a verbatim copy of the settlement agreed to between us and submitted to the Internal Revenue Service:

> "We have today arranged with Morton Sills and Benjamin Sills personally, to accept on their behalf in full payment for their indebtedness to us, under their personal guaranty, $13,000.00 payable as follows:
>
> | | | |
> |---|---|---|
> | Cash | $2,500.00 | |
> | Their notes with interest | $10,500.00 | (Payable monthly) |
>
> Sills represent and warrant that these funds are not and will not be corporate funds or collections from accounts receivable.

Exhibit A Annexed to Complaint

We will continue to collect the outstanding accounts receivable and report to you such collections twice a month, and remit to you such collections once a month. After the above referred-to personal notes of $10,500.00 and 6% interest are paid in full, we will give a general release to Sills of Cambridge, Inc. and the Individuals, and we will turn over to you all of the upaid accounts receivable that we hold as collateral.

The condition of the account as of today is:

The corporation owes to us	$22,768.39
We hold accounts receivable as collateral to secure the above (which includes accounts of doubtful and disputed collectability)	$28,319.28

In entering into the above settlement with the Sills, or agreeing to collect from the accounts receivable and remit such collections to you, we do not waive any of our rights to the collateral we now hold, or to take any and all legal action to enforce collection against or from the accounts receivable, the above Corporation and the Sills personally, if the $10,500.00 notes and interest are not paid in full.

It is understood that as long as the monthly remittances are made to you, you will hold in abeyance further action against Sills of Cambridge, Inc. and the Sills personally.

Your acceptance of and agreement to this does not waive any of your rights that you may have to the accounts receivable collateral that we now hold."

We hereby acknowledge receipt of check for $2,500.00 subject to collection, and your 10 monthly personal notes aggregating $10,500.00.

Exhibit A Annexed to Complaint

Very trully yours,

CHARGE-IT SYSTEMS, INC.

M. H. GOTTHILF
Morris H. Gotthilf, Chairman
of Board of Directors

MHG/sg

Consented, agreed to and accepted
BENJAMIN SILLS
MORTON SILLS

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FILED
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IN THE

Supreme Court of the United States

October Term, 1963

No. 50

MORRIS GOTTHILF,

Petitioner,

against

BENJAMIN SILLS, MORTON SILLS and SILLS OF CAMBRIDGE, INC.,

Respondents.

On Writ of Certiorari to the
NEW YORK SUPREME COURT
Appellate Division, First Judicial Department

PETITIONER'S BRIEF

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On the Brief:
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PHYLLIS TATE HOLZER

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On Writ of Certiorari to the NEW YORK SUPREME COURT Appellate Division, First Judicial Department

PETITIONER'S BRIEF

Opinions Below

The New York Appellate Division, First Department, rendered no opinion. The Supreme Court, New York County, rendered two memorandum opinions, one on February 15, 1962 (R. 44) and a second on March 14, 1962 (R. 45). These opinions are not reported.

Jurisdiction

The final order of the New York Appellate Division, First Department, was entered on September 20, 1962 (R. 46). Thereafter the petitioner sought to appeal to the New York Court of Appeals as of right pursuant to §588(1)(a) of the New York Civil Practice Act on the ground that §764 of the Civil Practice Act as applied in the instant case violated the Fourteenth Amendment's due process clause. The respondents moved to dismiss the appeal. On November 1, 1962 the New York Court of Appeals granted the motion "upon the ground that the order sought to be appealed from does not finally determine the action within the meaning of the constitution" (R. 48). The petition for a writ of certiorari was filed on December 19, 1962 and granted on April 1, 1963 (R. 49; 372 U. S. 957). The jurisdiction of this Court is invoked under 28 U. S. C. §1257(3).

Constitutional and Statutory Provisions Involved

1. United States Constitution, Fourteenth Amendment, §1:

> "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. New York Civil Practice Act, §764:

> "*Issuance of execution against the person generally.* Subject to the exception specified in the next section,

an execution against the person of a judgment debtor may be issued by the court or a judge or justice thereof, upon application by the judgment creditor, in a case where the judgment can be enforced by execution, as prescribed by section five hundred and four of this act, and where the plaintiff's right to arrest the defendant depends upon the nature of the action. The issuance of the execution shall rest in the discretion of such court, judge or justice. The application for the issuance of the execution may be made without notice, or with such notice as the court, judge or justice may direct, and shall be made by affidavit which shall set forth in detail the right of the party to the execution, the amount of the judgment, the amount unpaid, and the time when and place where the execution against the judgment debtor's personal property has been returned wholly or partially unsatisfied."

3. New York Civil Practice Act, §504:

"*Enforcement of judgment by execution.* In either of the following cases a final judgment may be enforced by execution:

"1. Where it is for a sum of money in favor of either party; or directs the payment of a sum of money. * * *"

4. New York Civil Practice Act, §826:

"*Right to arrest depending upon the nature of the action.* A defendant may be arrested in an action, as provided in this and the next article, where the action is brought for either of the following causes:

1. To recover a fine or penalty.

2. To recover damages for a personal injury.

3. To recover damages for an injury to property, including the wrongful taking, detention or conversion of personal property.

4. To recover damages for misconduct or neglect in office, or in a professional employment.

5. To recover damages for fraud, or deceit.

6. To recover a chattel where it is alleged in the complaint that the chattel or a part thereof has been concealed, removed or disposed of so that it cannot be found or taken by the sheriff * * *.

7. To recover for money received * * * [as a result of embezzlement or fraudulent misapplication by a public official or other fiduciary].

8. To recover * * * [public funds converted by the defendant].

9. In an action upon contract, express or implied, where it is alleged in the complaint that the defendant was guilty of a fraud in * * * incurring the liability, or that, since the making of the contract * * * he has removed or disposed of his property with intent to defraud * * *."

5. The New York Correction Law, §515, contains that State's "jail liberties" provision:

"A person in the custody of a sheriff, by virtue of an order of arrest; or of an execution in a civil action; or in consequence of a surrender in exoneration of his bail; is entitled to be admitted to the liberties of the jail, upon delivering to the sheriff an approved undertaking as prescribed in section five hundred and seventeen of this chapter."

6. Section 517 of the Correction Act provides in part:

> "The undertaking must be executed * * * in a penalty at least twice the sum * * * directed to be collected by the execution, if he is in custody under an execution * * *. Within two days after the approval by the court, judge or county judge, the undertaking must be filed * * * and a copy delivered to the party at whose instance the prisoner was in custody * * * who shall within three days thereafter serve * * * a notice that he does not accept * * * [the surety or sureties] as bail; otherwise he is deemed to have accepted them * * *. [There follows a provision for justification of bail and/or new bail.] This section applies to a civil prisoner only."

7. Section 72 of the Civil Rights Law imposes limits on the duration of a person's imprisonment pursuant to execution:

> "No person shall be imprisoned within the prison walls of any jail for a longer period than three months under an execution or any other mandate against the person to enforce the recovery of a sum of money less than five hundred dollars in amount * * * and where the amount * * * is five hundred dollars or over, such imprisonment shall not continue for a longer period than six months * * *. In computing the term of imprisonment time spent within the prison walls of any jail and time spent within the jail liberties shall be included * * *."

Question Presented

Does §764 of the New York Civil Practice Act, providing for body execution, as applied in the instant case simply to enforce collection of a debt, violate the due process clause of the Fourteenth Amendment of the United States Constitution?

Statement of the Case

The respondents seek a body execution "pursuant to Article 44 and Sec. 826 of the Civil Practice Act" (R. 4), against the petitioner Morris Gotthilf on a final judgment which resulted from a mistaken default order. Mr. Justice Abraham J. Gellinoff by an order entered at the Office of the Clerk of the Supreme Court, New York County, on March 26, 1962 allowed in all respects the motion of the respondents for body execution (R. 3-4). The Appellate Division, First Judicial Department, by an order entered in the office of the Clerk of that Department on September 20, 1962 affirmed Mr. Justice Gellinoff's order without opinion (R. 46). The New York Court of Appeals on November 1, 1962 sustained a motion of the respondents to dismiss the petitioner's appeal to that Court "upon the ground that the order sought to be appealed from does not finally determine the action within the meaning of the constitution" (R. 48).

In June 1960 Benjamin Sills, Morton Sills and Sills of Cambridge, Inc., brought suit against Charge-It Systems, Inc., and Morris Gotthilf, alleging fraudulent representations on the part of the defendants to the damage of the corporate plaintiff (R. 25-38). The defendants answered,

denying any fraudulent representations on their part; and setting up affirmative defenses and counterclaims which charged fraudulent representations on the part of the plaintiffs to the damage of the corporate defendant (R. 38-43).

On November 17, 1960 Mr. Justice Jacob Markowitz entered a default order against both defendants (R. 11). When it was discovered that the default order was against the individual defendant Morris Gotthilf, as well as the corporate defendant Charge-It Systems, Inc., the then attorney for the defendants, Archibald Palmer, Esq., made a motion to set aside the default, but this motion was denied in an order which was filed on March 10, 1961 (R. 11).

On May 9, 1961 Mr. Justice George M. Carney ordered a judgment in favor of the corporate plaintiff and against the defendants in the sum of $17,408.77 together with interest and costs; and on May 24, 1961 the clerk entered judgment in the amount of $17,408.77 plus interest in the amount of $1,697.36 and costs and disbursements of $188.25 for a total of $19,294.38 (see R. 5).

Thereafter Mr. Palmer unfortunately added to his first mistake a second error: he failed to specify in his notice of appeal to the Appellate Division, First Department, the order of March 10, 1961 denying the motion to set aside the default order against the individual defendant Morris Gotthilf. The plaintiffs in their brief in the Appellate Division now made the point that "the individual defendant, Gotthilf, having failed to appeal from the order denying his motion to vacate his default, the appeal taken herein is unauthorized and in violation of Section 557 of the Civil Practice Act." The Appellate Division affirmed without opinion. 15 A. D. 2d 458 (1961).

The charges and countercharges in this case have been extreme. Despite them, however, certain facts which are undisputed nevertheless emerge. The plaintiff corporation and the defendant corporation entered into a factoring agreement under which the defendant corporation as factor made large advances to the plaintiff corporation. On September 22, 1959 there was due under this factoring arrangement from the corporate plaintiff to the corporate defendant the sum of $22,768.39, for which the corporate defendant held as collateral, accounts receivable of $28,319.28 (R. 32). The figure of $28,319.28 included accounts of doubtful and disputed collectibility amounting to some $23,000.00 (R. 11). The existence of this worthless collateral plus the threat that the plaintiff would go into bankruptcy, induced the corporate defendant to settle the amount of $22,768.39 due it for $13,000.00, thereby sustaining a loss of some $9,500.00 (R. 11).

It is equally clear that everything which the defendant Morris Gotthilf did, he did in his representative capacity as chairman of the board of the corporate defendant, Charge-It Systems, Inc. (R. 13, 19). Moreover, there is no allegation in the instant complaint that the individual defendant Morris Gotthilf acted with malice or personally profited as a result of the alleged fraudulent acts (see R. 25-31). On the contrary, the complaint makes plain that Morris Gotthilf acted only on behalf of the corporate defendant. For instance, the complaint alleges in paragraph Eighth that "the Corporate Defendant, acting through Gotthilf, entered into an agreement with plaintiffs" (R. 26). On such allegations the individual defendant should not have been held liable. See, for example, *Potter* v. *Minskoff*, 4 N. Y. 695 (1958), 171 N. Y. S. 2d 88, 148 N. E. 2d

303, *affirming* 2 A. D. 2d 513, 156 N. Y. S. 2d 872 (4th Dept. 1956); *Matter of Brookside (Raybrook Textile Corp.)*, 276 App. Div. 357, 94 N. Y. S. 2d 509 (1st Dept. 1950); *Lukach* v. *Blair*, 108 Misc. 20, 178 N. Y. Supp. 8 (Sup. Ct. N. Y. Co. 1919), *aff'd*, 192 App. Div. 957 (1st Dept. 1920); *Hicks* v. *Haight*, 171 Misc. 151, 11 N. Y. S. 2d 912 (Sup. Ct. Nassau Co. 1939).

As to the default entered against both defendants, their then attorney, Mr. Palmer, swears that he thought he had an understanding with counsel for the plaintiffs that judgment would be entered against the corporate defendant only:

> "6. Prior to the scheduled time of the examination before trial of the defendants on October 27, 1960, deponent called the office of the attorney for the plaintiffs to obtain an adjournment of said examination due to his engagement in another matter at the scheduled time for the examination. Deponent was unable to reach plaintiffs' attorney at that time, and later in the morning deponent received a call from the office of plaintiffs' attorney and spoke to an individual whom he assumed to be Mr. Theodore Charnas. Deponent discussed the matter with said attorney and advised him that in view of the fact that the corporate defendant was insolvent and that it had been shown to said attorney that the individual defendant was not personally responsible, deponent would be willing to have judgment entered against the corporate defendant alone, and would thereupon abandon the counterclaims interposed in the verified amended answer. It was deponent's understanding that said attorney agreed to this proposal and that the matter was to be disposed of in this manner.

"7. Deponent thereafter proceeded upon the assumption that the motions made by the attorney for the plaintiffs were based upon this agreement and that said attorney was merely proceeding to enter judgment against the corporate defendant. It was not until deponent was served with a copy of the order signed by the Hon. Aron Steuer ganting judgment herein and setting down the matter for inquest on February 9, 1961, together with a notice of inquest which indicated that the plaintiffs were seeking execution against the person of the individual defendant herein, that deponent realized that plaintiffs' attorney had proceeded against the individual defendant as well as the corporation, contrary to his understanding with said attorney.

"8. Upon receiving these documents, deponent communicated with the attorney for the plaintiffs and inquired why said attorney had disregarded the agreement upon which deponent had permitted plaintiff's attorney to note a default in connection with the examination before trial originally scheduled for October 27, 1960. Deponent advised Mr. Theodore Charnas that in view of the fact that there were bona fide issues of fact involved in this action he could not possibly have consented to judgment against the individual defendant. Mr. Theodore Charnas replied that he had not personally handled the entry of the judgment herein and the proceedings subsequent thereto, and therefore was unable to answer deponent's inquiry. When deponent requested that Mr. Charnas vacate the judgment against the individual defendant, he was advised to make a motion for such relief.

"9. It appears from the order of the Honorable Jacob Markowitz dated November 16, 1960 that the plaintiffs' motion to strike the amended answer and counter-claims of defendants was granted upon the

representation of the counsel for plaintiffs that the defendants' counsel informed him that defendants had abandoned this case. As hereinabove shown, this representation was, at the very least, based upon a misunderstanding on the part of plaintiffs' counsel with respect to the statements made to him by deponent on October 27, 1960, and it was never deponent's intention to abandon the defense of the action against the individual defendant herein. It is apparent that since deponent had prepared a verified answer in this proceeding which raised bona fide issues of fact, he could never have consented to the entry of a default judgment against the individual defendant. In this connection I call to the Court's attention, as I have indicated at the outset in this affidavit, that the defendant Morris Gotthilf was not individually liable for the acts alleged in the complaint. Everything that Morris Gotthilf did, he did in a representative capacity as chairman of the Board of Directors of the corporate defendant. Accordingly, any liability running to the plaintiffs was from the corporate defendant and not from the individual defendant Morris Gotthilf." (R. 16-19)

Thus it happened that Morris Gotthilf never had his day in court. If he had had his day, he could have shown not only that everything he did, he did in a representative capacity as chairman of the board of directors of the corporate defendant; but also demonstrated the worthlessness of the accounts receivable that served as collateral for the advances from the corporate defendant to the corporate plaintiff. He could have shown that the amounts which were collected on this pretty worthless collateral after September 22, 1959 aggregated the grand and miserable total of but $3,663.02 (R. 14). The corporate defendant still ended up the loser to the extent of some $6,500.00 (R. 14).

Nevertheless, in his affidavit in opposition to the motion of the plaintiffs for body execution against him, Morris Gotthilf stood ready to cooperate with the court and offered to post bond in a reasonable amount to guarantee his presence and cooperation in any supplementary proceeding which the plaintiffs might wish to conduct (R. 15).

Mr. Justice Gellinoff was not satisfied (R. 44-45).

Morris Gotthilf filed an additional affidavit in which he stated:

> "2. I have no assets and the only income that I receive is from my business.
>
> "3. The net income (before taxes) which I received from my business for the past three years and in the current year to date is as follows:
>
> | | |
> |---|---|
> | 1962 to date | $ 3,177.54 |
> | 1961 Loss | (4,523.73) |
> | 1960 " | 11,543.30 |
> | 1959 " | 19,253.18 |
>
> • • •
>
> "5. Sometimes in the past I have had a successful refinancing which has brought me substantial income. I have some such transactions that I am working on now, but, like a lawyer with a case, I am not sure that they will be successful.
>
> "6. Concretely what I propose as a minimum is this: beginning March 1962 I will undertake to pay to the plaintiffs 25% of my net income, payable monthly on the 5th day of the following month, that is, the first payment to begin on April 5, 1962 and to continue monthly thereafter.
>
> "7. In conclusion I respectfully pray that the Court permit me to continue to try to earn all that I possibly can, for this will enable me to make payments

against the judgment. I have no other means whatever of obtaining funds. If I should be incarcerated I will have to stay there, for I will then be through professionally and in the finance field where I now make most of my present limited income.

"8. My heart prompts me to add two further thoughts, and they both stem from the fear that I have not appealed to Your Honor's discretion despite the fact that I have offered to do a little more than I think I can. The first thought is that if my offer of 25% of my net income is not high enough in the Court's opinion then I will try to comply with what the Court suggests it ought to be if the Court will make such a suggestion. The second thought is this: if the Court does grant the motion for the issuance of a body execution then my life is through, finished, professionally and in every other way; and in addition to this intolerable condition, I shall also have the problem of trying to persuade my attorney O. John Rogge to appeal to the Appellate Division, First Department from such an order, for as long as there is life in me I will continue to refuse to believe that in this wonderful country of ours a man can not only be deprived of his day in court but also have to go to jail, and that in a civil and not a criminal case. I know not how else to say it." (R. 21-22).

But Mr. Justice Gellinoff was not to be appeased (R. 45).

The petitioner argued before Mr. Justice Gellinoff that the court's application of §764 of the New York Civil Practice Act made this section violative of the due process clause of the Fourteenth Amendment to the United States Constitution. But Mr. Justice Gellinoff ruled otherwise, simply saying:

"Section 764 of the Civil Practice Act is constitutional." (R. 44)

Summary of Argument

With this Court's help under the due process clause of the Fourteenth Amendment, we shall soon come to look upon imprisonment for debt under such a provision as Section 764 of the New York Civil Practice Act as barbaric as we now regard lopping off a hand, or a hand and a foot, or flogging, as the penalty for certain offenses. Imprisonment for debt is already so out of accord with our regard for human dignity, that Section 764 violates the due process clause of the Fourteenth Amendment on a number of grounds:

a. Section 764 of the New York Civil Practice Act imposes a punishment on the petitioner without according him the incidents of a criminal trial, such as, for instance, an indictment or information specifying the charges against petitioner, proof of petitioner's guilt beyond a reasonable doubt, and a jury verdict by a unanimous jury.

b. Section 764 bears no reasonable relationship to the ends the legislature had in mind when the statute was enacted.

c. Section 764, taken together with Sections 515 and 517 of the New York Correction Law, denies petitioner the equal protection of the laws.

d. Section 764 inflicts upon petitioner a cruel and unusual punishment.

e. Section 764 imposes upon petitioner involuntary servitude other than as punishment for crime.

ARGUMENT

POINT I

Body Execution Generally

Perhaps the earliest of the English statutes treating imprisonment for debt is the *Statute of Marlborough*, enacted in 1267, which provided

> "[—] • • • That if Bailiffs, which ought to make account to their Lords, do withdraw themselves, and have no Lands nor Tenements whereby they may be distrained; then they shall be attached by their Bodies, so that the Sheriff, in whose Bailiwick they be found, shall cause them to come to make their account. • • • *Statute of Marlborough*, 1267, 52 Hen. 3, c. 23, §1 (repealed)."

While the differences are clear enough, doubtless medieval English legislation on the subject drew its inspiration from the ancient Roman practice of commiting debtors to slavery. See Holmes, *The Common Law* 14 (47th printing 1923); Hunter, *Roman Law* 968 (2d ed. 1885).

The reigns of Edward I (1277-1307) and Edward III (1327-1377) witnessed gradual expansions on the *Statute of Marlborough*. See, *e.g.*, *Statute of Westminster (II)*:

> "Concerning Servants, Bailiffs, Chamberlains, and all Manner of Receivers, which are bound to yield Accompt, it is agreed and ordained, That when the Masters of such Servants do assign Auditors to take their Accompt, and they be found in Arrearages upon the Accompt, all things allowed which ought to be allowed, their Bodies shall be arrested, and by the Testimony of the Auditors of the same Accompt, shall

be sent or delivered unto the next Gaol of the King's in those Parts; (2) and shall be received of the Sheriff or Gaoler, and imprisoned in Iron under safe Custody, and shall remain in the same Prison at their own Cost, until they have satisfied their Master fully of the Arrearages. (3) Nevertheless if any Person being so committed to Prison, do complain, that the Auditors of his Accompt have grieved him unjustly, charging him with Receipts that he hath not received, or not allowing him Expences, or reasonable Disbursements, and can find Friends that will undertake to bring him before the Barons of the Exchequer, he shall be delivered unto them; (4) and the Sheriff (in whose Prison he is kept) shall give Knowledge unto his Master, that he appear before the Barons of the Exchequer at a certain Day, with the Rolls and Tallies by which he made his Accompt; and in the Presence of the Barons, or the Auditors that they shall assign him, the Account [sic] shall be rehearsed, and Justice shall be done to the Parties, so that if he be found in Arrearages, he shall be committed to the Fleet, as above is said. * * * (7) And if he flee, and it be returned to the Sheriff that he cannot be found, exigents shall go against him from County to County, until he be outlawed, and such Prisoner shall not be replevisable. (8) And let the Sheriff or Keeper of such Gaol take Heed, if it be within a Franchise, or without, that he do not suffer him to go out of Prison by the common Writ called Replegiare, or by other Means, without Assent of his Master; (9) and if he do, and thereof be convict, he shall be answerable to his Master of the Damages done to him by such his Servant, according as it may be found by the Country, and shall have his Recovery by Writ of Debt. * * * *Statute of Westminster (II)*, 1285, 13 Edw. 1, Stat. 1, c. 11 (repealed)."

and the Statute of Acton Burnel, as it is called:

> "Forasmuch as Merchants, which heretofore have lent their Goods to divers Persons, be fallen in Poverty, because there is no speedy Remedy provided, whereby they may shortly recover their Debt at the Day of Payment * * * (12) * * * if it be found by the Roll or Writing, that the Debt was knowledged, and the Day of Payment expired, the Mayor or chief Warden shall cause the Body of the Debtor to be taken (if he be Lay) whensoever he happeneth to come in their Power, and shall commit him to the Prison of the Town, if there be any, and he shall remain there at his own Costs, until he hath agreed for the debt. * * * *Statute of Merchants*, 1285, 13 Edw. 1, Stat. 3, c. 1 (repealed)."

and the *Statute of Purveyors* as well:

> "Item, it is accorded, That such process shall be made in a writ of debt and detinue of chattels and taking of beasts, by writ of *Capias*, and by process of exigend by the sheriff's return, as is used in a writ of accompt. *Statute of Purveyors*, 1351, 25 Edw. 3, Stat. 5, c. 17 (repealed)."

The two centuries following on Edward III's statute must have been a time when all sorts of legislation suffered from local maladministration—everyone is familiar with the civil wars and dynastic changes which almost destroyed the young English nation in the Fifteenth Century—but in any event by 1565 imprisonment for debt had become so tainted that Elizabeth felt obliged to sponsor the enactment which follows:

> "Where divers persons of their malicious minds, and without any just cause, do many times cause and procure others of the Queen's majesty's loving sub-

jects, to be very much molested and troubled by attachments and arrests made of their bodies, as well by process of *latitat alias* and *pluries capias*, sued out of the court commonly called the King's bench * * * (2) and when the parties that be arrested or attached are brought forth to answer such actions and suits as should be objected against them, then many times there is no declaration or matter laid against the parties so arrested or attached, whereunto they may make any answer; (3) and so the party arrested is very maliciously put to great charges and expences, without any just or reasonable cause: and yet nevertheless, hitherto, by order of the law, the party so grieved and vexed could never have any costs or damages to him to be judged or awarded for the said unjust vexation and trouble: II. For remedy whereof * * * [the defendant is to have costs, damages, and charges where the plaintiff delays or discontinues the action]. * * * IV. And if any person or persons * * * shall by any way or mean, maliciously, or for vexation and trouble, cause or procure any other person or persons to be arrested * * * at the suit or in the name of any person or persons, where indeed there is no such person or persons known, or without the assent, consent or agreement of such person or persons * * * and shall thereof be convicted or lawfully accused by indictment, presentment, or by the testimony of two sufficient witnesses or more, or other due proof, shall for every such offense * * * have and suffer imprisonment of his or their body or bodies by the space of six months without bail or mainprise * * * [and shall have to pay to the unjustly arrested person three times his costs, charges, damages, and expenses and to the person in whose name the arrest or attachment issued, ten pounds]. 1565, 8 Eliz. 1, c. 2 (repealed)."

Nevertheless, the case of the *dishonest* debtor presented a separate issue in Elizabethan minds; a long procession

of special statutes began with the one enacted in the reign of Henry VIII, which recites that

> "divers and sundry persons, craftily obtaining into their hands great substance of other men's goods, do suddenly flee to parts unknown, or keep their houses, not minding to pay or restore to any their creditors, their debts and duties * * * 1543, 34 & 35 Hen. 8, c. 4 (repealed)."

and empowers various officials to imprison the persons of such debtors and to distribute their assets among their creditors. See 8 Holdsworth, *History of English Law* 236 (1926 ed.). The 1543 statute was replaced by a more comprehensive one in 1571, see 13 Eliz. 1, c. 7, which was, in turn, amended and enlarged by statutes of 1604, see 1 Jac. 1, c. 15, and 1623, see 21 Jac. 1, c. 19. See also Holdsworth, *supra*, at 237. It is significant that none of these "dishonest debtor" statutes provided that the debtor would be relieved of his obligation upon being confined; later sources indicate that at common law execution upon the person discharged the debt. In *Strong* v. *Linn*, 5 N. J. L. 936 (Sup. Ct. 1820), the court said:

> "Now, if a *ca. sa.* [*capias ad satisfaciendum*, of which more later] be executed, that is sufficient in law for the whole debt * * * so that if you take the body at all you take it for the whole debt. * * * A *ca. sa.*, as respects the party against whom it is taken, is a full satisfaction by force, act and judgment of law, so that against him and his representatives there can be no other, for when the plaintiff hath begun and chosen the body he can resort to no other execution against the self-same party. * * * It is true that the common law has been altered by statute in this respect, in cases where the defendant escapes or dies in prison;

> there, by the force of the statute, there may be a resort to the goods, but in all other cases * * * it still remains in its full force. *Id.* at 941."

See also Holmes, *supra*, at 14: "The principle of our own law, that taking a man's body on execution satisfies the debt, although he is not detained an hour * * *." Therefore it appears that even from the earliest times the Anglo-American community distinguished between instances of genuine destitution on the one hand and wilful withholding of funds on the other. The statute of 1571, 13 Eliz. 1, c. 7, *supra*, provided that creditors should continue, after execution upon the debtor's person, in all their remedies in respect of any unpaid portion of the debt. See 8 Holdsworth, *supra*, at 240.

From here it is but a small step to the proposition that the common law of body execution, through its writ of *capias ad satisfaciendum*, did not seek to punish the honest but impoverished debtor. In *Lewis* v. *Morland* (1818), 2 B. & Ald. 56, 106 Eng. Rep. 288, Holroyd, J. had it that the matter in issue was "clearly in the nature of mesne process, and is not analogous to a ca. sa. where a party is brought into Court to satisfy his debtor [creditor?] * * *." *Id.* at 65, 106 Eng. Rep. at 291. Blackstone was of the same opinion:

> "The intent of it [the writ] is to imprison the body of the debtor, till satisfaction be made for the debt, costs, and damages: it therefore doth not lie against any privileged persons, peers or members of parliament, nor against executors or administrators, nor against such other persons as could not be originally held to bail. 3 Blackstone, *Commentaries on the Laws of England* 414 (6th ed. 1775)."

See also *In re Haight*, 11 Civ. Pro. 227 (N. Y., County Ct. 1886): "The English process which we call an execution against the person or body execution, is intended to confine the debtor until he satisfies the debt." *Id.* at 229; and see "Execution," 16 *Halsbury's Laws of England* 62-63 (3d ed. 1956): "The mandate of the writ of *capias ad satisfaciendum* (usually known as a *ca. sa.*) is to take the execution debtor, if he should be found in the bailiwick, and him safely keep so that the sheriff may have his body * * * to satisfy the execution creditor * * *." as well as Holmes, *supra*, at 14: "The principle of our own law, that taking a man's body on execution satisfies the debt * * *."

Whatever the theory in these early days of the development of the law of body execution, the abuses inflicted by creditors did not abate and the sheriffs' connivings were added to the debtor's woes. The courts showed little sympathy, if Justice Hyde's dictum in *Manby* v. *Scott* accurately portrays the judiciary's sentiments:

> "If a man be taken in execution, and lie in prison for debt, neither the plaintiff, at whose suit he is arrested, nor the sheriff who took him, is bound to find him meat, drink or clothes; but he must live on his own, or on the charity of others; and if no man will relieve him, let him die in the name of God, says the law * * * [and] so say I * * *. 1 Mod. 124, 132, 86 Eng. Rep. 781, 786 (K. B. 1663)."

Some relief, however, came with *An act for the relief and release of poor distressed prisoners for debt*, passed in 1670:

> "Forasmuch as very many persons now detained in prison, are miserably impoverished, either by reason of the late unhappy times, the sad and dreadful fire, their own misfortunes, or otherwise, so as they are

totally disabled to give any satisfaction to their creditors, and so become, without advantage to any, a charge and burden to the kingdom, and by noisomness (inseparably incident to extream poverty) may become the occasion of pestilence and contagious diseases, to the great prejudice of the kingdom; (2) be it therefore enacted * * * That it shall and may be lawful to and for any justice of the peace * * * by warrant under his hand and seal, to require the sheriff, gaoler, or keeper of any prison * * * to bring without delay, the body of any person being in prison for debt * * * or damages (and petitioning such justice to be discharged) to some convenient place within the distance of one mile from the said prison; (3) and shall certify the cause and causes of the imprisonment, before the same justice * * *. II. And in case such prisoner coming before such justice shall take an oath to this effect, viz.

"I A. B. do upon my corporal oath solemnly profess and declare before Almighty God, That I have not any estate real or personal, in possession, reversion or remainder, of the value of ten pounds in the whole, or sufficient to pay the debt or damages for which I am imprisoned; (2) and that I have not directly or indirectly sold, leased, or otherwise conveyed, disposed of, or entrusted all or any part of my estate, thereby to secure the same, to receive or expect any profit or advantage thereof, or defraud or deceive any creditor or creditors whatsoever to whom I stand indebted. III. * * * (2) [W]hen if it shall appear * * * that the said oath taken by the said prisoner, be not disproved by good testimony of any credible person or persons upon oath * * * then the said justices being satisfied therewith, shall direct their warrant * * * commanding the said sheriff, gaoler, or keeper of the prison, to set at liberty, and discharge the said prisoner, if imprisoned for the causes aforesaid, and no other * * *. XI. And likewise that the said lord chief justices, lord chief

baron, and justices of the peace in their several jurisdictions, and all commissions for charitable uses, do their best endeavours and diligence to examine and find out the several legacies, gifts and bequests bestowed and given for the benefit and advantage of the poor prisoners for debt * * * and the same so found out and ascertained, to order and settle in some manner and way, that the prisoners hereafter may not be defrauded, but receive the full benefit thereof, according to the true intent of the donors. * * * XIII. And whereas it is become the common practice of gaolers and keepers * * * to lodge together in one room or chamber and bed, prisoners for debt and felons, whereby many times honest gentlemen, tradesmen and others, prisoners for debt, are disturbed and hindred in the night-time from their natural rest, by reason of their fetters and irons, and otherwise much offended and troubled by their lewd and prophane language and discourses, with most horrid cursing and swearing much accustomed to such persons; (2) be it enacted by the authority aforesaid, That it shall not be lawful hereafter for any sheriff, gaoler or keeper of any gaol or prison, to put, keep or lodge prisoners for debt and felons together in one room or chamber; but that they shall be put, kept and lodged separate and apart one from another in distinct rooms * * *. 1670, 22 & 23 Car. 2, c. 20. See also 8 Holdsworth, *supra*, at 234-35."

In 1678 the statute was amended as follows:

"Whereas by * * * An Act for Relief and Release of Poor Distressed Prisoners for Debt * * * Provision hath been made for Relief and Release of such Prisoners as were in Prison for Debt or Damages * * * Notwithstanding which, the persons of such Prisoners have not been discharged of their Imprisonments * * * Be it now enacted * * * That such weekly allowance [not exceeding eighteen pence per week] shall be paid to

the Prisoner himself, and not to the Goal [sic] -Keeper * * * and if within the space of Three months after such weekly Allowance by any Creditor, no Estate of the Prisoner shall be discovered or made out * * * then the said Prisoner shall forthwith be Discharged by Warrant * * * as fully and amply as if such Prisoner had been Discharged by the Justices of the Peace at their Quarter Sessions, as in the said recited Act is mentioned * * *. Provided also, That no person shall be Discharged by this Act, that hath not, or shall not before such Oath made, have remained in Prison by the space of Six moneths. Provided also, That no person by virtue of this Act shall be Discharged out of Prison, who shall stand Charged in Execution with more then [sic] the Sum of Five hundred pounds to any one person, Principal Money, and Damages. * * * Provided always, That no Merchant Stranger, or other Alien or Foreigner that hath been Arrested, and is in Prison on any Action or Suit, for or by reason of any Debt, or other Engagement Contracted or Entered into beyond the Seas, shall have any benefit by this Act * * *. *An Act for the further Relief and Discharge of Poor Distressed Prisoners for Debt*, 1678, 30 Car. 2, See also 8 Holdsworth, *supra*, at 235."

Further:

"In 1690 an attempt was made to prevent debtors from using the Acts to defraud their creditors, by causing themselves to be imprisoned in collusive actions [2 W. & M., Sess. 2, c. 15]; and further amendments of the law were made in 1694 [5 & 6 W. & M., c. 8] and 1695-1696 [7 & 8 Will., c. 12]. It was provided by the latter of these two Acts that the Acts should not apply to debtors taken in execution for the non-payment of fines imposed for offenses [§8], to debtors to the king [§9], or to those owing damages for wrongs which were felonious [§15]. *Ibid.*"

But matters cannot have improved to any appreciable extent for, as Holdsworth put it:

> "The number of these Acts leads us to think that they were not very effectual, either to procure the release of prisoners, or to put a stop to the malpractices of gaolers or their officers. The justices of the peace were not well fitted to do the duties imposed on them. Gaolers and officials were more likely to side with rich creditors than poor debtors; and the same might be said of many of the justices. *Id* at 236."

In London, in 1768, there appeared a little volume entitled *Insolvency, with Observations Concerning the Same, By a Gentleman of the Middle Temple.* The identity of its author remains unknown but his "Observations" merit attention:

> "I have ever looked upon the present mode of proceeding against debtors not only oppressive towards them, but injurious to the creditors, and more particularly so, where the debtors are taken to gaol or stand committed to either of his majesty's prisons of the King's Bench or Fleet. • • • When a debtor is arrested, as before mentioned, for want of bail, he is taken on or before the return of the writ or process, to the county gaol, or removed by habeas corpus at the expence of four pounds and upwards, in proportion to the distance of the place from whence he is conveyed and brought before a judge of the court, out of which the habeas corpus issued and by him committed, for want of bail, to the prison of such court. Now if the plaintiff has an inclination to be vexatious (as is too often the case), he may remove the defendant to the prison of the court out of which his writ or process issued, in order to proceed against him there • • • or • • • to the prison of the different court (though such

step is quite unnecessary in respect to the proceedings), and then the defendant having provided himself with bedding, room, &c. in the prison to which he was first committed, is obliged, for convenience sake, to be at the expence of being removed back again. This is a grievance and an heavy one, as it too frequently happens, such a prisoner by this means destroys all he can get from others, as well as what he can scrape together of his own, before he can get himself properly immured. After all this apparatus, the plaintiff need not declare against the prisoner until the last day of the second term, after the return of his writ, including the term in which his writ was returnable, which (if he chooses to keep him in duress) he will take care to do. Then he has three terms more to proceed against him, to tryal or judgment, including the term in which the declaration was delivered, which, when done, he has two more terms, including the last of the three, to charge him in execution; by the time all this is performed, the prisoner has been upwards of an year and an half in confinement: now, if the cause of action does not exceed the sum of one hundred pounds, the prisoner, when in execution, may present his petition for relief under that wholesome act, called the Lord's act [1759, 32 Geo. 2, c. 28]; a rule is thereupon granted, pursuant to such petition, for the prisoner to be brought before the court on such a day as is therein mentioned; a copy of such rule being first served upon the plaintiff or his attorney, the prisoner is brought up accordingly, and delivers in his schedule of his estate and effects (if he has any), and conforms in all respects to the direction of the said act: [See also 3 Blackstone, *supra*, at 416.] but the plaintiff's attorney generally appears, and telling the court he is dissatisfied in respect to the verity of the schedule (which is more a matter of cruel form than reality), the prisoner is ordered, on such dissatisfaction, back to prison, and

to be brought up again the second day of the next term. Frequently a long vacation intervenes, which delights an oppressive plaintiff, or if the second bringing up happens in a Trinity term, then the plaintiff will pay his debtor one or two allowances, as directed by the said act, and then drop him; notwithstanding which, the defendant must remain in prison until the next ensuing term, as he cannot be discharged but by moving the court for that purpose, though I cannot see why the practice might not allow of its being done before a judge at his chambers. Thus revenge enjoys near two years gratification within the rules of practice; but what is a prisoner to expect who stands charged with above the sum of one hundred pounds? he must endeavour to make his distresses familiar to him, till the cries of mercy move a legislature to restore him to liberty, and his starving family. If prisoners, under this circumstance, were to have *in misericordia quorentis* inscribed upon their backs, how would humanity shudder at seeing thousands perishing under that badge? thus I have endeavoured, briefly, to set forth the form of proceedings against imprisoned debtors; and I am apt to believe every impartial breast, upon maturely considering this mode of process, must think it extremely oppressive, *ab initio ad infinitum*. * * * I should be glad to be informed of any one penal law now existing, which meerly inflicts imprisonment, that falls so heavy upon the criminal, as the laws against prisoners for debt. * * * [T]hese seeming defects and hardships give rise to the multiplicity of petitions from all the gaols and prisons in England, imploring that relief of the legislature, which the creditor refuses to grant. *Id.* at 1, 5-9, 10, 14."

But in England "that relief of the legislature, which the creditor refuses to grant" was still a century away. It was not until 1869 that Parliament finally abolished im-

prisonment for debt, and then only with important exceptions. The famous Debtors Act, which won approval in that year, declared that:

> "With the exceptions herein-after mentioned, no person * * * shall be arrested or imprisoned for making default in payment of a sum of money."
>
> "There shall be excepted from the operation of the above enactment:
>
> "1. Default in payment of a penalty, or sum in the nature of a penalty, other than a penalty in respect of any contract:
>
> "2. Default in payment of any sum recoverable summarily before a justice or justices of the peace:
>
> "3. Default by a trustee or person acting in a fiduciary capacity and ordered to pay by a court of equity any sum in his possession or under his control:
>
> "4. Default by any attorney or solicitor in payment of costs when ordered to pay costs for misconduct as such, or in payment of a sum of money when ordered to pay the same in his character of an officer of the court making the order:
>
> "5. Default in payment for the benefit of creditors of any portion of a salary or other income in respect of the payment of which any court having jurisdiction in bankruptcy is authorized to make an order:
>
> "6. Default in payment of sums in respect of the payment of which orders are in this Act authorized to be made:
>
> "Provided, first, that no person shall be imprisoned in any case excepted from the operation of this sec-

tion for a longer period than one year; and, secondly, that nothing in this section shall alter the effect of any judgment or order of any court for payment of money except as regards the arrest and imprisonment of the person making default in paying such money. *The Debtors Act*, 1869, 32 & 33 Vict., c. 62, §4."

Section 5 is equally pertinent:

> "*Saving of power of committal for small debts.*—Subject to the provisions herein-after mentioned, and to the prescribed rules, any court may commit to prison for a term not exceeding six weeks, or until payment of the sum due, any person who makes default in payment of any debt or instalment of any debt due from him in pursuance of any order or judgment of that or any other competent court. Provided—* * *
>
> "(2) That such jurisdiction shall only be exercised where it is proved to the satisfaction of the court that the person making default either has or has had since the date of the order or judgment the means to pay the sum in respect of which he has made default, and has refused or neglected, or refuses or neglects, to pay the same.* * *
>
> "No imprisonment under this section shall operate as a satisfaction or extinguishment of any debt or demand or cause of action, or deprive any person of any right to take out execution against the lands, goods, or chattels of the person imprisoned, in the same manner as if such imprisonment had not taken place. * * * *Id.*, §5."

By the terms of Section 5, then, a "dishonest" debtor not subject to the exceptions enumerated in Section 4 might nevertheless be imprisoned, but for no longer than six weeks and only upon the court's finding that the means were available but the will lacking. The old distinction was, in part, preserved.

Soon the courts were faced with the question of whether the general policy of the Act envisioned punishment. In the case of *Marris* v. *Ingram*, 13 Ch. D. 338 (1879), Lord Jessel said that

> "• • • [T]he Act abolishes imprisonment for debt in the case of an honest debtor, but it is at the same time intended for the punishment of a fraudulent or dishonest debtor. It is in that sense vindictive, and intended to be so. *Id.* at 343. See also *Buckley* v. *Crawford*, [1893] 1 Q. B. 105, 108; *In re Gent*, 40 Ch. D. 190, 194-95 (1888)."

while in *Barrett* v. *Hammond*, 10 Ch. D. 285 (1879), the court construed the Act as follows: "The law [that is, the Debtors Act] does not act vindictively; the Court has no power to inflict any punishment upon the man • • •." *Id.* at 288-89. Without even attempting to answer the question, the writer would call attention to the last-cited paragraph of Section 5. Should it be read as reversing the common-law notion of satisfaction for the debt or rather as no more than an accommodation to the reality that six weeks in prison was, relatively, so short a period of confinement that few creditors could hope to have complete satisfaction by insisting on it?

• • •

Moving on to the American experience, it should be noted at the very outset that the independence of the United States was not the occasion for a general abolition of body execution, either at the instance of the states or of the federal government.

> "The most important of the planks were the demands for education and for the abolition of imprison-

ment for debt. Education would diffuse knowledge, and knowledge, the early labor leaders believed, was power. • • •

"But the main specific grievance came to be the question of imprisonment for debt. In 1830 five sixths of the persons in the jails of New England and the Middle states were debtors, most of them owing less than twenty dollars. The law was thus, in effect, a class law, for, by withdrawing debtors from the economic world, it prevented their saving up and paying off. It was, moreover, insulting, for in last analysis it assumed that debtors would never meet their obligations unless prompted by terror of punishment. General fears about loss of status thus began to focus on imprisonment for debt as a peculiarly cruel and wanton agency of degradation.

"• • • In December, 1822, [Colonel Richard M.] Johnson proposed a bill in the United States Senate abolishing imprisonment as a punishment for complaints of debt in federal courts. Van Buren and others supported him, but for some years it failed of passage. Punctually Johnson would reintroduce it each session, delivering a new speech crammed with fresh and horrifying examples and ending with a stirring appeal to democratic principles. His object was less to achieve a concrete reform, for the number of people imprisoned on federal writs was negligible, than to give the whole movement national significance. His orations, widely reprinted and circulated, spread the agitation throughout the land.

"The chief opposition came from the business community with its vague but deep conviction that imprisonment for debt was bound up with sanctity of contracts. 'I shall surely get no thanks from any one,' wrote John Quincy Adams testily in 1831, con-

templating a letter on this question, 'for pointing to the consequences * * * upon the security of property and upon fidelity to contracts, as well as upon credit.' Van Buren reported meeting the greatest hostility among merchants and lawyers. * * *

"When Jackson became President, he added his prestige to Johnson's perseverance ('it should be the care of a republic not to exert a grindstone power over misfortune and poverty'), and finally, in 1832, the bill passed both Houses and became a law.[1] Schlesinger, *The Age of Jackson* 134-36 (1950)."

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1. The present federal statute on the subject is 28 U. S. C. §2007 (1958): "*Imprisonment for debt.* (a) A person shall not be imprisoned for debt on a writ of execution or other process issued from a court of the United States in any State wherein imprisonment for debt has been abolished. All modifications, conditions, and restrictions upon such imprisonment provided by State law shall apply to any writ of execution or process issued from a court of the United States in accordance with the procedure applicable in such State. (b) Any person arrested or imprisoned in any state [sic] on a writ of execution or other process issued from any court of the United States in a civil action shall have the same jail privileges and be governed by the same regulations as persons confined in like cases on process issued from the courts of such State. The same requirements governing discharge as are applicable in such State shall apply. Any proceedings for discharge shall be conducted before a United States commissioner for the judicial district wherein the defendant is held." See also Fed. R. Civ. P. 64: "At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought, subject to the following qualifications: (1) any existing statute of the United States governs to the extent to which it is applicable; (2) the action in which any of the foregoing remedies is used shall be commenced and prosecuted or, if removed from a state court, shall be prosecuted after removal, pursuant to these rules. The remedies thus available include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies, however designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action." And see the Virgin Islands Bill of Rights, 48 U. S. C. §1561 (1958): "* * * No person shall be imprisoned or shall suffer forced labor for debt."

And even today the State of New York does not stand alone in its adherence, in one form or another, to a policy authorizing imprisonment for debt. In 1921 it was written that

> "* * * almost two centuries after English debtors, seeking relief from the harsh laws of England, founded an American colony, the institution of the debtor's prison still prevails in Illinois and in other states of the Union, though many have abolished it altogether. Parnass, *Imprisonment for Civil Obligations in Illinois*, 15 Ill. L. Rev. 559, 571 (1921). See also Note, 26 Colum. L. Rev 1007, 1009 (1926)."

But the outcry has been a long and bitter one, witness Colonel Johnson's campaign, *supra*, and a book written by one Thomas Herttell in 1823:

> "By the law of imprisonment for debt * * * a creditor could put his debtor in prison and keep him there, until he starved to death or paid the debt, and that without any regard to the merits or demerits of his prisoner. This is the law of imprisonment for debt, exhibited in its native deformity; and by it the first law of nature, that of self-preservation, is violated; because the debtor, being deprived of his personal liberty, is restrained in the means of maintaining himself: he is also compelled to the violation of those natural obligations which bind him to maintain his family, and all would starve to death were there no means for their relief other than the tender mercy of the law in question. * * * [I]t is no sufficient answer to this charge, nor even a compliment to that law, to allege, that the benevolence of friends, or the public alms and and soup-houses, have, and always will, prevent that, which otherwise would be its deplorable consequences; for that law must be radically bad, as well

> as evil in its effects, which requires the continual exercise of the benevolence of friends, the philanthropy of strangers, and the interposition of public charity, to avert its unrighteous operation. * * * Should a person go into court with such a contract in his hand, and insist upon its execution, would not a humane, moral, and religious audience, indignantly exclaim, "Worse than Shylock! He would have been satisfied with a pound of human flesh, but this man would have the whole carcass at his own disposal." What an iniquitous contract that must be, the consequences of which are so abhorrent to the human feelings! yet as bad as it may be, and unquestionably is, it contains nothing more than what is authorized and justified by the law of imprisonment for debt, in concert with the spirit of which, however astonishing it may appear, it is absurdly assumed as an *axiom* in forensic logic, that "*the imprisonment of the body is the greatest satisfaction* known to the law:" a position which not only violates truth and common sense, but goes the length of arraying acts of barbarity in the robes of justice. By its fruit the tree is known; and those are surely unrighteous laws which authorize a course of conduct, from which the benevolent feelings of the human heart revolt. Herttell, *Remarks on the Law of Imprisonment for Debt; Showing Its Unconstitutionality, and Its Demoralizing Influence on the Community* 13-14, 15, 17-18 (1823)." (All italicized in original.)

Eighty years later Mr. Chief Justice Hughes added his views as follows:

> "The reform should be completed, and, save in cases of contempt of court, and where it may be necessary to arrest the defendant in order to insure the performance of an act, the failure to perform which would be punishable as a contempt * * * arrest and

> imprisonment in civil cases should be abolished. * * * The statutes * * * are a constant menace to the innocent; they are the occasion for wrongs even more serious, because committed under the guise of legal process, than those which they were designed to prevent and to punish. Provisions of such slight utility at the best and so commonly perverted should be repealed without delay. Hughes, *Arrest and Imprisonment on Civil Process*, 28 Rep. N. Y. State Bar Ass'n 151, 170, 179-80 (1905).
>
> See also Medina, *Shall New York Surrender Leadership in Procedural Reform?*, 29 Colum. L. Rev. 158, 168 (1929) ('It was never intended that there should be one rule for the rich and another for the poor.')."

Now, in 1963, the Court has the opportunity to consider the constitutional implications of body execution as that institution has survived under the laws of the state of New York.

POINT II

By our current standards of decency and fairness, body execution to enforce a civil debt has become so barbarous and obsolete that it violates the due process clause of the Fourteenth Amendment.

Late in the last century, this Court began what has become an extended and expansive application of the due process clause of the Fourteenth Amendment. This development was a natural one, for it was in accord with the historical origin and role of due process clauses. Today in this country whenever a lawyer has a case in the state courts in which he feels that his client has not been given the consideration which our current standards of fairness and decency and our regard for the individual

human being require, he turns to the due process clause of the Fourteenth Amendment. The writer traced this development in his recent volume *The First and the Fifth* 59-75 (1960).

In the first term after the appearance of the writer's volume, this Court set aside state court decisions in nearly a dozen cases because of violations of the due process clause of the Fourteenth Amendment. In *Culombe* v. *Connecticut*, 367 U. S. 568 (1961), *Peck* v. *Pate*, 367 U. S. 433 (1961), and *Rogers* v. *Richmond*, 365 U. S. 534 (1961), this Court set aside state court convictions because they involved forced confessions.

In *Ferguson* v. *Georgia*, 365 U. S. 570 (1961), *Reynolds* v. *Cochran*, 365 U. S. 525 (1961), and *McNeal* v. *Culver*, 365 U. S. 109 (1961), this Court set aside state court convictions because the defendants were deprived of the effective assistance of counsel.

In addition to these decisions, the like of which occur at almost every term, this Court held in *Smith* v. *Bennett*, 365 U. S. 708 (1961), that a state cannot make the writ of habeas corpus available only to prisoners who can pay the necessary filing fees; in *Irvin* v. *Dowd*, 366 U. S. 717 (1961), that Leslie Irvin had not had a fair trial because pre-trial publicity, which labelled him as the "mad dog killer", had prejudiced the jury against him; in *Torcaso* v. *Watkins*, 367 U. S. 488 (1961), that Maryland's requirement that a state officeholder declare his belief in God was invalid; in *Marcus* v. *Search Warrants*, 367 U. S. 717 (1961), that a general state warrant for the seizure of allegedly obscene material was illegal; and in *Mapp* v. *Ohio*, 367 U. S. 643 (1961), overruling its earlier decision to the contrary in *Wolf* v. *Colorado*, 338 U. S. 25 (1949), that material illegally

seized by state officers was inadmissible even in a state court proceeding.

In *Ferguson* v. *Georgia*, 365 U. S. 570 (1961), this Court held that Georgia practice which allowed a criminal defendant to make an unsworn statement but denied him the aid of his counsel's questioning while making it, unconstitutionally deprived him of the effective assistance of counsel. This case arose out of the fact that Georgia retained the old common-law rule that a defendant in a criminal case could not be sworn on his own behalf. Georgia was the only state to keep this old rule. Justices Frankfurter and Clark would have gone further than the rest of the Court: they would have held that this old rule, which Mr. Justice Clark characterized "as an unsatisfactory remnant of an age gone by", violated the Fourteenth Amendment's due process clause.

If the old common-law rule, centuries old, that a defendant in a criminal case could not be sworn on his own behalf, is now the basis for a violation of the Fourteenth Amendment's due process clause, then it is submitted that §764 of the New York Civil Practice Act, providing for body execution, as applied in the instant case simply to enforce the collection of a debt, likewise now violates this clause.

POINT III

Petitioner was denied due process of law because Section 764 of the New York Civil Practice Act imposed a punishment on petitioner without according him the incidents of a criminal trial, in violation of the Fourteenth Amendment to the Constitution of the United States.

A. Section 764 imposed a punishment on petitioner.

The history of Section 764 of the New York Civil Practice Act points clearly to the fact that when it was enacted in its present form, by the Laws of 1940, ch. 552, §1, the legislature intended to impose a punishment upon such judgment debtors as petitioner.

The inquiry must begin with the Stillwell Act, Laws of 1831, ch. 300, which bore the title *An Act to abolish Imprisonment for Debt, and to punish Fraudulent Debtors.* While it is true that the Act "made no distinction between classes of debtors, but all were equally entitled to a discharge if * * * [the] proceedings were just and fair," *In re Haight*, 11 Civ. Pro. 227, 229-31 (N. Y., County Ct. 1886), the judgment debtor seeking discharge from imprisonment was required to take an oath "that he had not at any time * * * disposed of * * * his estate * * * with the view * * * or intent to injure or defraud any of his creditors." *Ibid.* If the prisoner refused so to swear, or swore falsely, obviously the court would order him to return to jail, *ibid.*, and hence it follows that the proceedings for discharge were designed to discover "fraudulent debtors" and to insure their continued incarceration, as well as to set in motion the release of impoverished victims of body execution.

Moreover, in 1869 New York's highest court had occasion to discuss the Stillwell Act; its conclusion on the question of punishment fully supports petitioner's construction:

> "It would not be profitable to dwell upon the reasons moving the legislature to punish fraud, and to treat the fraudulent debtor as a criminal, or to inquire whether it is reasonable to punish a fraudulent debtor with more severity than any other willful wrong-doer * * *. The statute does not purport to imprison for debt, but to punish for an offense. * * * [T]he legislature intended to punish the fraudulent debtor * * *." *People ex rel. Latorre* v. *O'Brien*, 6 Abb. Pr. (n.s.) 63, 67, 68, 69 (N. Y. Ct. App. 1869).

Furthermore, the opinion in *In re Haight, supra*, closed its description of the discharge proceedings under the Stillwell Act with the following observation:

> "This Act was * * * modified in 1833 * * * and afterwards, with further modifications, became a part of the Revised Statutes * * * but none of these modifications affect in anywise the general scope and theory of the Act. The proceedings upon the part of the debtor have always * * * required * * * that he swear, in substance, that he has not disposed of any part of his property with intent to injure or defraud any creditor." *Id.* at 231.

Now although the Stillwell Act was repealed by the Laws of 1880, ch. 245, §1(9), the use of the present tense of the verb "affect" six years thereafter constituted nothing short of a declaration on the part of the New York court that the Act's policy remained in full force after the enactment of the Code of Civil Procedure in 1880.

It should also be noted that in 1905 Mr. Chief Justice Hughes was able to characterize the New York statute as

"unsound in principle. The statute is essentially a *punitive* measure. * * * [A]s a *punitive* statute, it is least defensible. Punishment should be for wrongs done to the community." Hughes, *Arrest and Imprisonment on Civil Process*, 28 Rep. N. Y. State Bar Ass'n 151, 170-71 (1905). (All italicized in original.)

Hence when Mr. Justice Gellinoff wrote that the "defendant has neglected to bare completely his present financial status and future prospects, and to present any plan for payment of the judgment" (R. 45), it is clear that he did not abuse his discretion under New York law, but rather regarded his discretion as determined by the history of Section 764.

Turning now to the constitutional meaning of "punishment," two recent decisions of this Court make it plain that the statute in question imposed a punishment on petitioner within the meaning of the highest law of the land.

In *Trop* v. *Dulles*, 356 U. S. 86 (1958), the petitioner, a native-born American, lost his citizenship by reason of his conviction by court martial of wartime desertion. His application for a passport was denied on the ground that under Section 401 (g) of the Nationality Act of 1940, as amended, 8 U. S. C. §1481 (a)(8)(g), he had lost his citizenship because of the conviction and the ensuing dishonorable discharge. In 1955 the petitioner therefore initiated an action for a judgment declaring him a citizen. The District Court having granted the Government's motion for summary judgment, and the Court of Appeals for the Second Circuit having affirmed, this Court granted certiorari. *Id.* at 88. Mr. Chief Justice Warren held, for the Court, that the loss of citizenship constituted a cruel and unusual punishment within the meaning of the Eighth Amendment, but

what was said on the question of punishment generally has great bearing on petitioner's present Point:

> "But the Government contends that this statute does not impose a penalty and that constitutional limitations on the power of Congress to punish are therefore inapplicable. * * * Doubtless even a clear legislative classification of a statute as "non-penal" would not alter the fundamental nature of a plainly penal statute. * * * The Court has recognized that any statute decreeing some adversity as a consequence of certain conduct may have both a penal and a nonpenal effect. The controlling nature of such statutes normally depends on the evident purpose of the legislature." *Id.* at 94, 95, 96.

Moreover, the Court's opinion, by Mr. Justice Goldberg, in the very recent case of *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144 (1963), sets out several criteria for determining which sanctions constitute punishments and which do not:

> "Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions. * * * Here * * * the statute's *primary* function is to serve as an additional penalty for a special category of draft evader." *Id.* at 168-70 (Emphasis added.)

It is as though Mr. Justice Goldberg had in mind Section 764, not the statutes involved in the *Mendoza-Martinez* case. Is there an "affirmative disability or restraint" greater than imprisonment? Is not *scienter* the basis of fraud? Does not imprisonment "promote the traditional aims of punishment"? And does it not appear "excessive in relation to the alternative purpose [presumably, coercion of payment] assigned"?

Petitioner submits that the *Trop* and *Mendoza-Martinez* cases put it beyond dispute that Section 764 imposed a punishment on petitioner within the meaning which the Court has become accustomed to assign to the word. *Cf. Flemming* v. *Nestor*, 363 U. S. 603, 614 (1960); *United States* v. *Constantine*, 296 U. S. 287, 294 (1935).

B. *The imposition of a punishment without the incidents of a criminal trial violates the due process clause of the Fourteenth Amendment.*

In support of the proposition that no one can be punished without the benefits of a criminal trial petitioner relies, again, on the authority of this Court, but before proceeding to the cases, it might prove profitable to turn to some of the non-judicial authorities cited in the historical summary which precedes the Argument.

In 1823 Thomas Herttell wrote that:

> "* * * the law of imprisonment for debt, which authorizes any creditor to deprive an honest, guiltless debtor, of his right of personal liberty, and to take him and imprison him, for *any sum of debt;* and, which also authorizes any creditor to deprive a *fraudulent* debtor of his right of personal liberty, contrary to the law of the land, which declares, that 'no person shall be taken and imprisoned for *any* offence, unless it be

by indictment, presentment, &c. in due form, and by due process of law,' in criminal cases, is as plain and obvious an infraction of the constitution and bill of rights of the people of this state, as imagination can suggest. Herttell, *Remarks on the Law of Imprisonment for Debt; Showing Its Unconstitutionality, and Its Demoralizing Influence on the Community* 34-35 (1823)" (All italicized in original.)

and Mr. Chief Justice Hughes was of the identical opinion:

"Under the existing law in civil cases, the defendant is arrested upon an order based upon affidavits; he is not taken before a magistrate that his case may be examined; he has no right to be confronted with witnesses or to cross-examine them. * * * He is as truly imprisoned as if arrested on criminal process, but is denied the privileges of one accused of crime. * * * If one has been guilty of wrong deserving of punishment by imprisonment, he should be punished in an orderly way, by criminal procedure, which, while sufficiently stringent to protect every proper interest, is just, and even merciful, as compared with the law of civil arrest. If there is any case of wrong within the law of civil arrest, which should be punished by imprisonment, and which is not already covered by the criminal statutes, let the latter be amended to cover it. Hughes, *supra*, at 172-73."

Further:

"* * * [E]xecution against the body * * * presents the anomaly of imposing a criminal consequence upon a civil judgment, a judgment based on a verdict and on a trial of the issues wherein the charges need be proved merely by a preponderance of the evidence, and not, as in other cases where criminal consequences follow, beyond all reasonable doubt. Parnass, *Imprisonment for Civil Obligations in Illinois*, 15 Ill. L. Rev. 559, 571-72 (1921)."

Turning, then, to the cases in this Court, *Wong Wing* v. *United States*, 163 U. S. 228 (1896), held that a punishment may not be imposed absent the incidents of a criminal prosecution; the United States Commissioner's sentence of one year at hard labor was overthrown as repugnant to the Fifth and Sixth Amendments to the Constitution. But in *Wong Wing* Congress had expressly declared the forbidden conduct criminal, that is to say, only the method of determining guilt was at issue. Petitioner maintains, therefore, that while the decision in *Wong Wing* may have carried with it the implication that no punishment may be imposed without the incidents of a criminal trial regardless of whether the legislature has declared the defendant's activity criminal, the case is not controlling authority for the proposition that any punishment imposed pursuant to some proceeding other than a full criminal trial is void as violative of due process.

Rather, Petitioner relies again on the Court's opinion in *Kennedy* v. *Mendoza-Martinez, supra;* here the Court filled the gap left open by *Wong Wing*:

> "Conviction for draft evasion * * * is not prerequisite to the operation of this sanction. Independently of prosecution, forfeiture of citizenship attaches when the statutory set of facts develops. * * * This being so, the Fifth and Sixth Amendments mandate that this punishment cannot be imposed without a prior criminal trial and all its incidents, including indictment, notice, confrontation, jury trial, assistance of counsel, and compulsory process for obtaining witnesses. If the sanction these sections impose is punishment, and it plainly is, the procedural safeguards required as incidents of a criminal prosecution are lacking. We need go no further. * * * We conclude, for the reasons stated, that §§401(j) [of the National-

> ity Act of 1940, as amended] and 349(a)(10) [of the Immigration and Nationality Act of 1952] are punitive and as such cannot constitutionally stand, lacking as they do the procedural safeguards which the Constitution commands. * * * Dating back to Magna Carta * * * it has been an abiding principle governing the lives of civilized men that 'no freeman shall be taken or imprisoned * * * without the judgment of his peers or by the law of the land.' What we hold is only that, in keeping with this cherished tradition, punishment cannot be imposed 'without due process of law.' Any lesser holding would ignore the constitutional mandate upon which our essential liberties depend. *Id.* at 166-67, 186."

But under §764 of the Civil Practice Act a vindictive creditor or his attorney can inflict on a judgment creditor the criminal sanction of imprisonment without any of the safeguards of a criminal trial. There is no indictment or information. On the contrary, the application may be made in an *ex parte* manner. It may be made upon nothing more than a mere affidavit, and it need not even be made by the creditor—his lawyer can do it. If the order for body execution is signed, the sheriff can literally pick the judgment debtor off the street and take him directly to jail. Moreover, after the statutory time has elapsed and the judgment debtor is released, he can be re-incarcerated on another judgment arising out of, for example, the same transaction or business failure, thus in theory keeping him in civil jail for the rest of his life—if there are enough judgments.

All this may happen to one who merely lost a civil action wherein the plaintiff proved his case by a mere preponderance of the evidence, and then, in a jury case, by

convincing only ten jurors out of twelve. Further, the judgment could have arisen out of a trial before only a judge without a jury, or before a referee, or even as a result of a summary judgment or other motion.

Moreover, the judgment creditor can be a corporation, or even an assignee of the original claim. If the body execution arose out of a negligence action, the negligent act could have been committed by the jailed judgment debtor's agent or servant. (*Ossmann* v. *Crowley*, 101 App. Div. 597, 92 N. Y. Supp. 29 (1st Dept. 1905).)

Finally, as in the instant case, the judgment creditor can have acquired his status simply by virtue of a default judgment. Incarceration for such a reason is shocking, yet it has happened!

If a law allowed one to be convicted (and thereafter jailed) for *criminal* fraud on a "preponderance" of the evidence by convincing ten out of twelve jurors, or one judge or as a result of losing a motion, and allowed incarceration to be initiated by the People on an *ex parte* application by affidavit, it would clearly be a denial of due process. Yet that is exactly what section 764 allows.

Moreover in a criminal action a not guilty verdict ends forever the threat of jail for the defendant on the offense charged; but in a civil action new trials can be granted for many different reasons over and over again after a defendant has won. Each time, the prospective judgment debtor is subjected to jail if ultimately he loses and can not pay. If section 764 does not violate due process, then neither does trial by ordeal, oath or combat, with which the statute may legitimately be compared, and with which it properly belongs.

Petitioner contends, therefore, that the New York legislature's failure to declare his conduct criminal is irrelevant to the issue at hand, and that the punitive nature of the sanction having already been established above, the operation of Section 764 of the New York Civil Practice Act upon Petitioner deprived him of due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

POINT IV

Petitioner was denied due process of law because Section 764 of the New York Civil Practice Act is, by its own terms, entirely incompatible with its clearly expressed purpose, and was therefore enacted in violation of the Fourteenth Amendment to the Constitution of the United States.

Petitioner submits that Section 764, when construed together with other applicable provisions, must fall as repugnant to the firmly-established constitutional principle that a state statute must bear some reasonable relationship to the ends the legislature had in mind when the statute was enacted. For the purposes of this Point it is unnecessary to assume that Section 764 imposes a punishment in the constitutional sense of the word, for the principle behind this Point rests in considerations of "substantive due process," as it has been called, and not in those of "procedural due process." See Rogge, *The First and the Fifth* 62-63 (1960).

In *Nebbia* v. *New York*, 291 U. S. 502 (1934), this Court, through Mr. Justice Roberts, laid down this test of substantive due process:

> "* * * [T]he guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. * * * If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied. *Id.* at 525, 537."

It is Petitioner's position that "the means selected" by Section 764, when that statute is construed in the light of other pertinent provisions, bear no "real and substantial relation to the object sought to be attained," as that object can be gleaned from the clearly expressed purpose of the statute.

It is obvious from the discussion in Point III that the purpose which motivated the legislature in its enactment of Section 764 was a desire to curtail the activities of "fraudulent debtors," and surely no one would argue that this desire, leaving aside the means employed, is not a constitutionally valid one. But even a glance at Sections 515 and 517 of the New York Correction Act makes it plain that any judgment debtor under body execution imposed by Section 764 can, if he has the means, escape the rigors of imprisonment (be it of itself constitutionally valid or not), and that if he has not the means, cannot. In short, the fraudulent debtor, the party who can pay the judgment, can escape confinement altogether simply by convincing a surety to split the risk with him, while the truly destitute debtor, in cases where the trial court's discretion was unwisely exercised in favor of imprisonment, suffers the confinement actually intended by the legislature for another.[2]

If any more need be said, petitioner refers the Court to its opinion in *Dean Milk Co.* v. *City of Madison*, 340 U. S. 349 (1951). There, in striking down a municipal ordinance regulating the sale of milk and milk products, the Court observed that "reasonable and adequate alternatives [to the ordinance] * * * [were] available." *Id.* at 354. In the case at bar, too, "reasonable and adequate alternatives are available." See Section 903 of the Civil Practice Act (warrant of attachment against the defendant's property), Section 878 (temporary injunction), and Section 773 (examination in supplementary proceedings). See generally Note, 26 N. Y. U. L. Rev. 172, 179-80 (1951).

Thus, petitioner has shown that Section 764, when construed together with the "jail liberties" provisions, is self-defeating to an almost absurd extent. In view of the oppressive features of that Section, see Point III, *supra*, and in view of the alternatives available, there can be no escape from the conclusion that the enactment of Section 764 constituted a violation of the due process clause of the Fourteenth Amendment.

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2. See Section 510 of the New York Correction Law for the "jail liberties" in the various counties throughout the State. In the case of any prison situated in the city of New York, the defendant will find the prison walls extended to the boundaries of the city for the full term of imprisonment imposed, that is, six months or three months, depending on the sum sought to be collected. See Section 72 of the Civil Rights Law. For an able description of the New York "jail liberties" provisions generally, see Medina, *Shall New York Surrender Leadership in Procedural Reform?*, 29 Colum. L. Rev. 158, 168 (1929).

POINT V

Petitioner was denied the equal protection of the laws because Section 764, taken together with Sections 515 and 517 of the New York Correction Law, impeded petitioner, solely by reason of his financial inability, in the exercise of his right, in violation of the Fourteenth Amendment to the Constitution of the United States.

> "Providing equal justice for poor and rich, weak and powerful alike is an age-old problem. People have never ceased to hope and strive to move closer to that goal. * * * In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color. * * * Such a denial is a misfit in a country dedicated to affording equal justice to all and special privileges to none in the administration of its criminal law." *Griffin* v. *Illinois*, 351 U. S. 12, 16-17, 19 (1956).

Petitioner's present contention is that Section 764 and the "jail liberties" provisions in the Correction Law operate in such a way as to deprive him of the equal protection of the laws, one of his precious rights under the Fourteenth Amendment.

Again, as under Point III, the fundamental notions which underlie the thesis of petitioner's position can be found among the non-judicial as well as among the judicial authorities. Take, for example, Judge Medina's statement of the problem:

> "It was never intended that there should be one rule for the rich and another for the poor. And yet a person with means at his disposal or with friends or rela-

tives of means may lightly disregard the law as to arrest and body execution. * * * The poor man may be unable to procure such a [jail liberties] bond in which event he must remain in jail." Medina, *Shall New York Surrender Leadership in Procedural Reform?*, 29 Colum. L. Rev. 158, 168 (1929).

Or that of Thomas Herttell:

"True, the law by which bail, in the cases stated, is allowed, tend, in a degree, to lessen the hardships of the debtor, but do not go the length of restoring him to the full enjoyment of his natural, unalienable, and political rights. The mercies of those laws are only offered to those who happen to have friends oppulent [sic] enough to be their security, and thus ward off a while, the evils of a close confinement within the prison walls. That a debtor has friends, who are able and willing to stand between him and the unrestrained operation of the law of imprisonment for debt, is an accidental, adventitious circumstance, extraneous to the law, and which operates kindly, as far as it goes, on those who are fortunate enough to fall within its reach: but the debtor, however honest, who happens to be poor and friendless, can find in those laws of bail, no alleviation of his misfortunes; but, as before, is left unassisted, to sustain the full effects of that engine of oppression, by which, though guiltless of any crime, he is 'taken and imprisoned,' in direct violation of the bill of rights and constitution of the state." Herttell, *supra*, at 29-30.

Or that of Mr. Chief Justice Hughes:

"These apparently generous provisions were of little aid to the destitute. * * * Admission to the jail liberties was a great boon, but not within the reach of anyone who could not command a surety able to justify

> in twice the amount for which he had been held to bail, or which was due upon the execution. * * * But for the poor defendant who cannot give such bail there is no relief. He must remain in prison. * * *"

Hughes, *supra*, at 156-57, 169.

The law today is as contemptuous of financial discrimination in the administration of criminal justice as were its servants fifty and one hundred and fifty years ago. *Griffin* v. *Illinois*, *supra*, articulated for the first time the constitutional principle that a state may not impose financial obstacles in the path of free exercise by all of the rights granted them in respect of criminal prosecutions. A whole family of cases has already grown around the *Griffin* decision. See *Lane* v. *Brown*, 372 U. S. 477, 483-85 (1963); *Winters* v. *Ohio*, 370 U. S. 721 (1962); *Burns* v. *Ohio*, 360 U. S. 252, 257-58 (1959); *Eskridge* v. *Washington State Bd. of Prison Terms & Paroles*, 357 U. S. 214, 216 (1958). In *Smith* v. *Bennett*, 365 U. S. 708 (1961), the Court said:

> "While habeas corpus may, of course, be found to be a civil action for procedural purposes * * * it does not follow that its availability in testing the State's right to detain an indigent prisoner may be subject to the payment of a filing fee. * * * When * * * [a] right is granted by a State, financial hurdles must not be permitted to condition its exercise. *Id.* at 712-13."

See also *Gideon* v. *Wainwright*, 372 U. S. 335, 348 n.2 (1963) (due process clause); *Bearden* v. *United States*, 372 U. S. 252 (1963); *Elchuk* v. *United States*, 370 U. S. 722 (1962); *Bearden* v. *United States*, 304 F. 2d 532, 540-42 (5th Cir. 1962) (dissenting opinion of Judge Rives), *vacated*, 372 U. S. 252 (1963).

The Court of Appeals of New York has recognized the *Griffin* principle. See *People* v. *Stanley*, 12 N. Y. 2d 250, 252, 189 N. E. 2d 478, 479, 238 N. Y. S. 2d 935, 937 (1963); *People* v. *Pitts*, 6 N. Y. 2d 288, 291-93, 160 N. E. 2d 523, 524-26, 189 N. Y. S. 2d 650, 652-54 (1959); *People* v. *Breslin*, 4 N. Y. 2d 73, 77, 149 N. E. 2d 85, 87, 172 N. Y. S. 2d 157, 160-61 (1958); *People* v. *Kalan*, 2 N. Y. 2d 278, 280, 140 N. E. 2d 357, 358, 159 N. Y. S. 2d 480, 481 (1957).

Petitioner submits, however, that the case at bar presents a stronger one than did *Griffin* at the time of its adjudication in this Court: *Griffin* declared that a state may not condition *the exercise of a right granted to all*, the right to appeal a criminal conviction, on financial ability, whereas in the present controversy the New York jail liberties statutes are open to no construction other than that the existence in any given individual of *the right itself*, the right to avoid imprisonment for debt, is conditioned upon the amount of money at his disposal. Obviously such a discrimination constitutes a far greater imposition on the Constitution.

Were it to be suggested that the doctrine of the *Griffin* case and its progeny does not extend beyond rights in criminal proceedings, Petitioner would urge first that the holding in *Smith* v. *Bennett*, *supra*, is otherwise, and second, and more ardently, that Point III of the Argument established that the body execution system in New York can be styled criminal in all respects save that of the safeguards granted the debtor.

Similarly, it cannot be said that Petitioner's position entails the conclusion that statutes providing for the ordinary kinds of bail violate the equal protection clause, for bail is imposed in order to insure compliance by the de-

fendant with some future requirement, such as appearing for trial or surrendering for execution of sentence, while the jail liberties provisions grant the well-heeled judgment debtor complete relief from the requirement previously imposed.

In sum, Petitioner has shown that Section 764, taken together with the provisions in the New York Correction Law, deprived him of the equal protection of the laws because under the New York scheme only those who have available twice the amount of the judgment debt are granted the right to be admitted to the jail liberties, and this in violation of the Fourteenth Amendment to the Constitution of the United States.

POINT VI

Section 764 of the New York Civil Practice Act inflicted a cruel and unusual punishment upon petitioner, in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Petitioner's next contention is that imprisonment for debt, as an institution, carries with it so many connotations obnoxious to modern standards of decency that it must be invalidated as constituting a cruel and unusual punishment violative of the due process clause of the Fourteenth Amendment to the Constitution. See *Louisiana ex rel. Francis* v. *Resweber*, 329 U. S. 459, 462, 479 (1947) (majority and dissenting opinions).

Point III, *supra*, establishes that body execution is a punishment within the constitutional meaning of the word.

The history of the New York statute and two recent decisions of this Court preclude any other conclusion.

Therefore, as was said in *Trop* v. *Dulles*, 356 U. S. 86, 99 (1958):

> "The question is whether this penalty subjects the individual to a fate forbidden by the principle of civilized treatment guaranteed by the Eighth Amendment. *Id.* at 99."

Clearly the validity of any particular sanction will not be adjudicated by this Court on the basis of what was regarded as cruel and unusual punishment by the architects of the Constitution.

> "The Court [has] recognized * * * that the words of the Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Id.* at 100-01.

Hence Petitioner would suggest that "the evolving standards of decency" which have characterized the development of our country from its inception leave no room for imprisonment for debt. How can it possibly be maintained by any enlightened participant in the democratic experiment that throwing a man in jail because he cannot satisfy his creditors does not detract in very great measure from the grandeur of the living Constitution?[3]

All punishments which by their excessive length or severity are greatly disproportionate to the offenses charged violate due process. See *O'Neil* v. *Vermont*, 144 U. S. 323 (1892). Thus, in *Weems* v. *United States*, 217

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3. For a discussion of cruel and unusual punishment generally, see Note, 36 N. Y. U. L. Rev. 846 (1961).

U. S. 349 (1910), the Court condemned a Philippine statute providing for twelve to twenty years in jail for entry of a known false statement in a public record. The gross disparity between the offense and the punishment, especially when compared with the punishment for more serious crimes, made it cruel and unusual.

In *Trop* v. *Dulles, supra,* loss of citizenship resulting from court martial conviction of a wartime military deserter and subsequent dishonorable discharge, was held unconstitutional as being cruel and unusual punishment. This Court characterized it a form of punishment more primitive than torture.

A California statute making it a misdemeanor merely to be addicted to narcotics—although they were not used within the state and although there was no anti-social behavior there—was held unconstitutional under the Fourteenth Amendment on the theory that even one day in jail for such a "crime" would constitute the imposition of cruel and unusual punishment. *Robinson* v. *California,* 370 U. S. 660 (1962).

In view of the evils sought to be prevented, and the above *criminal* cases, it is apparent that section 764 does in fact impose cruel and unusual punishment. One can be incarcerated for merely owing a *civil* debt, when he has committed no crime against society, nor anyone else. It is possible that the judgment debtor could owe as little as ten dollars, or even less. The judgment (as here) can have been taken upon a default, and the order for body execution can have been issued completely *ex parte.*

In the *Robinson* case, *supra,* the Court observed that even one day's deprivation of liberty for the "crime" of merely being a narcotics addict, or for the "crime" of

having a common cold, was cruel and unusual. Under that rationale, is it not also cruel and unusual punishment to send a man to jail for the "crime" of being unable or unwilling to pay a civil judgment?

POINT VII

The New York State "body execution" statute violates the due process clause of the Fourteenth Amendment because it imposes involuntary servitude other than as punishment for crime.

The Thirteenth Amendment prohibits involuntary servitude "* * * except as a punishment for crime whereof the party shall have been duly convicted. * * *" But petitioner has never been convicted, duly or otherwise, of any crime.

However, once a body execution is ordered pursuant to section 764, the judgment debtor is incarcerated, solely in order to enforce the *civil* debt, just as surely and finally as one who has been found guilty after a formal criminal conviction for bank robbery. The difference between the two is merely one of duration and perhaps type of treatment; but the involuntariness of the servitude is exactly the same.

Therefore, incarceration of a judgment debtor in a civil jail pursuant to section 764 merely for owing a civil debt, is the imposition of involuntary servitude for something other than crime and without one's being duly convicted of crime. As such, it violates the due process clause of the Fourteenth Amendment.

In this connection the *Peonage Cases*, 123 Fed. 671 (M. D. Ala. 1903), are of interest. An Alabama statute,

directed at defaulting sharecroppers, provided criminal liability and imprisonment for farm workers and tenants who left their employment, breached their contracts, and became employees of others. The statute was held unconstitutional because it attempted to coerce payment of a purely civil liability arising out of breach of contract, by means of *criminal* proceedings. The case presently before this Court presents even a worse situation. Here, payment of a purely civil liability is sought to be coerced not even by a criminal law (with all the guarantees implicit therein), but by a civil law the result of which is a criminal incarceration. It would appear that the instant case is an *a fortiori* one to the *Peonage Cases.* See also *Bailey* v. *Alabama,* 219 U. S. 219 (1911); *United States* v. *Reynolds,* 235 U. S. 133 (1914).

Conclusion

Imprisonment for civil debt is as anachronistic as lopping off a hand for theft; or, under the Assize of Northampton (1176), a hand and a foot for forgery or arson. Certainly today it is unbecoming a free people for a judge to be able to say to a defendant in a civil case, involving a civil debt, that he either pay it all or go to jail. The final order which affirmed the granting of respondent's motion for an order directing the issuance of an execution against petitioner's person should be vacated.

Respectfully submitted,

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After this brief will have been filed, and on September 1, 1963, there will go into effect in New York a new Civil Practice Law and Rules (CPLR). Three different sections of the CPLR deal with body arrest which can take place *after* judgment: sections 5250, 6101, 6111.

Although the cross-reference table from the Civil Practice Act to the CPLR indicates that section 764 of the Civil Practice Act has been omitted, one is also instructed to compare CPLR sections 6101 and 6111. A study of sections 5250, 6101 and 6111 of the CPLR shows that all that really happened is that the New York legislature took Section 764 of the old Civil Practice Act and put it in different sections of the CPLR. Sections 5250, 6101 and 6111 of the CPLR follow:

> **"§5250. Arrest of judgment debtor**
>
> "Upon motion of the judgment creditor without notice, where it is shown that the judgment debtor is about to depart from the state, or keeps himself concealed therein, and that there is reason to believe that he has in his possession or custody property in which he has an interest, the court may issue a warrant directed to the sheriff of any county in which the judgment debtor may be located. The warrant shall command the sheriff to arrest the judgment debtor forthwith and bring him before the court. The sheriff shall serve a copy of the warrant and the papers upon which it was based upon the judgment debtor at the time he makes the arrest. When the judgment debtor is brought before the court, the court may order that he give an undertaking, in a sum to be fixed by the court, that he will attend before the court for examination and that he will obey the terms of any restraining notice contained in the order."

Appendix

"§6101. Grounds for arrest

"An order of arrest as a provisional remedy may only be granted:

"1. Where there is a cause of action to recover damages for the conversion of personal property, or for fraud or deceit, and the person to be arrested is not a woman; or

"2. Where the plaintiff has demanded and would be entitled to a judgment or order requiring the performance of an act the neglect or refusal to perform which would be punishable by the court as a contempt and where the defendant is not a resident of the state or is about to depart therefrom, by reason of which non-residence or departure there is danger that such judgment or order will be rendered ineffectual."

"§6111. Order of Arrest

"An order of arrest as a provisional remedy may be granted, in the discretion of the court, without notice, before or after service of summons and at any time before or after judgment. It shall specify the amount of bail, be indorsed with the name and address of the plaintiff's attorney and be directed to the sheriff of any county in which the defendant may be located. The order shall command the sheriff to arrest the defendant forthwith, keep him in custody and bring him before the court, in the county where the arrest is made, for a hearing within a time specified in the order, not exceeding forty-eight hours, exclusive of Sundays and public holidays, from the time of the arrest."

Section 5250 deals with arrest *after* judgment of a judgment debtor if he is about to leave the state or is hiding

within the state, if there is reason to believe he has property sufficient to pay all or part of the judgment.

Section 6101 provides for arrest as a *provisional remedy* in cases of fraud or deceit, conversion of personal property, or where plaintiff can win a judgment calling for performance of an act. Section 6111 provides that the order of arrest *as a provisional remedy* can be granted even *after* judgment.

Under section 764 of the Civil Practice Act, application was by the judgment creditor. Under Rule 6112 of the CPLR it still is. Under section 764 (via Section 826) body execution could be had in cases inter alia of fraud, deceit, and conversion of personal property. The same is true under section 6101. Under section 764 issuance was in the court's discretion. The same is true under section 6111. Under section 764 application was without notice. So it can be under section 6111. Most important, under section 764 body execution occurred *after* judgment —now, under section 6111, a judgment debtor can be arrested *still after judgment.*

Indeed under the new CPLR, civil arrest can be had *after* judgment, not only under one section, but under more than one: sections 5250, 6101 and 6111. To one who is jailed after September 1, 1963 pursuant to sections 6101 and 6111, it makes little difference that the incarceration is termed a "provisional remedy". He is still imprisoned in a civil action.

Moreover, the legislature's euphemistic nomenclature of arrest *after* judgment being a "provisional remedy" is both a contradiction in terms and totally inconsistent with the other real provisional remedies.

Appendix

What is provisional about being arrested after judgment? How does it keep one, or one's property, within the jurisdiction pending the outcome of the trial, so as to be amenable to the outcome? How is it to be equally compared to an attachment, sequestration, receivership or even an arrest *before* or during trial?

Regardless of what it is called—a provisional remedy or otherwise—and without the necessity of going into legislative intent vis-a-vis what happened to the prior section that was *numbered* 764, it is perfectly clear that under the new CPLR a judgment debtor can be jailed merely because he owes a civil debt. He can be jailed in the same manner, in the same place, by the same people, and for the same period of time.

The exact same deprivation of liberty exists whether or not he is jailed pursuant to what is nicely called a "provisional remedy."

Sections 6101 and 6111 are merely new combinations of the old law! Arrest after judgment under old section 764, and arrest before judgment under old section 818 are now both found in 6111—regardless of what it is called.

As to effective date, as well as effect on pending and subsequent proceedings, the new CPLR provides:

"§10003. Pending and subsequent proceedings

"This act shall apply to all actions hereafter commenced. This act shall also apply to all further proceedings in pending actions, except to the extent that the court determines that application in a particular pending action would not be feasible or would work injustice, in which event the former procedure applie-

Appendix

Proceedings pursuant to law in an action taken prior to the time this act takes effect shall not be rendered ineffectual or impaired by this act."

• • •

"§10005. Effective date

"This act shall take effect September first, nineteen hundred sixty-three."

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Supreme Court of the United States

No. 50—October Term, 1963

MORRIS GOTTHILF,

Petitioner,

against

BENJAMIN SILLS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE NEW YORK SUPREME COURT, FIRST JUDICIAL DEPARTMENT

BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK, *AMICUS CURIAE*, IN SUPPORT OF THE DISMISSAL OF THE WRIT AS IMPROVIDENTLY GRANTED, OR THE AFFIRMANCE OF THE DETERMINATION UNDER REVIEW.

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Comes now the Attorney General of the State of New York and asks leave of the Court to file this brief as *Amicus Curiae*.

The decision under review is reported in 17 A. D. 2d 723 (R. 46). It affirmed an order of the Supreme Court, New York County, granting the judgment plaintiffs' application for the issuance of a body execution (N. Y. Civil Practice Act, § 764) against the individual defendant, the present petitioner.

A motion for leave to appeal to the Court of Appeals of New York was dismissed for want of jurisdiction in the

Court to entertain it. Jurisdiction was declined because "the order sought to be appealed from does not finally determine the action within the meaning of the Constitution" (R. 47; reported 12 N. Y. 2d 761).

An appeal to the Court of Appeals thereafter taken as of right upon the ground that the constitutional rights of the appellant were directly involved was dismissed upon the same ground as the prior order of that Court dismissing the motion for leave to appeal (R. 48; reported 12 N. Y. 2d 792), *viz.*, the order was not a final determination of the action. It was the *judgment* which finally determined the action, not the order for body execution.

POINT I

Given the non-final character under New York Law of the order brought before this Court for review, the petitioner has failed to exhaust the remedies available to him under State Law.

(1)

New York Civil Practice Act, § 589, subdivisions 1 and 4 read, so far as relevant, as follows:

> "§ 589. *Appeal by permission. Appeal to the court of appeals by permission lies only*
>
> 1. by permission of the appellate division, and not otherwise,
>
> (a) from a judgment or order of the appellate division which does not finally determine the action or special proceeding in which it is entered, and
>
> (b) from a judgment or order of the appellate division in an action or a special proceeding which was originally commenced in a court other than the supreme court, a county court, a surrogate's court, or the court of claims, unless the construction of the

constitution of the state or of the United States is directly involved; and

* * *

4. (a) The appeals authorized by this section shall be allowed upon questions of law when required in the interest of substantial justice; and the appellate division, when it allows such an appeal, shall certify that questions of law have arisen which in its opinion ought to be reviewed by the court of appeals.

(b) In its order allowing an appeal from a judgment or order which does not finally determine an action or special proceeding the appellate division shall certify the questions of law decisive of the correctness of its determination or of any separable portion thereof; and the determination shall then be reviewable in the court of appeals in the manner prescribed in sections six hundred and three and six hundred and six of this act. The court of appeals shall certify to the appellate division its answers to the questions certified and shall direct the entry of the appropriate order or judgment."

The clause in subd. 1(b), beginning with the word "unless" does not impair the force and pertinence of our submission that the instant writ was improvidently granted. The purpose of the clause was to make it clear that all cases directly involving the State or the federal constitution were appealable without the prior permission of the Appellate Division—such permission having formerly been required if the litigation had originated in one of the lower courts. The quoted statute (as amended by L. 1954, ch. 346) was thus brought in line with the liberalizing amendment to the State Constitution adopted in 1944 (Art. VI, § 7). The Judicial Conference so stated in proposing the 1954 amendatory statute. See their Twentieth Report (1954), pp. 79-80. And see Cohen & Karger, *Powers of the New York Court of Appeals* (1952), p. 246.

But the 1944 constitutional amendments left unaltered the requirement in Art. VI, § 7, subd. (4) that appeals from non-final orders could only be taken to the Court of Appeals by leave of the Appellate Division, upon a question or questions certified. The section was merely renumbered, and the crucial words are now in Art. VI, § 3, subd. (4).

It is clear upon the Transcript of Record filed in this Court that the petitioner has at no time applied to the Appellate Division for leave to appeal upon a certified question or questions.

Generally speaking, it is the custom of the Appellate Division to certify questions in cases where the interlocutory posture of the case prevents an important constitutional question from being brought before the Court of Appeals.

An example is *New York Rapid Transit Corp.* v. *City of New York*, 303 U. S. 573 (1938). This action, to challenge the constitutionality of one of the emergency, excise tax, local laws passed by the City in 1934 and amended in 1935, was begun by an action in the Supreme Court, New York County, for money had and received, *i.e.*, sums paid under protest pursuant to the requirement of a tax law challenged as unconstitutional. The law was stricken down as unconstitutional in the Court of first instance, and in consequence an order was entered denying the City's motion to dismiss the complaint. This is *par excellence* an example of a non-final order. The Appellate Division affirmed. 251 App. Div. 710. The order left the case still not appealable as of right to the Court of Appeals. The City moved under the quoted sections of the Civil Practice Act for leave to appeal on a certified question, and the motion was granted. See 251 App. Div. 798, where the Court said:

"Motion for leave to appeal to the Court of Appeals granted; question certified."

The language of the certified question was:

"Does the complaint herein state facts sufficient to constitute a cause of action?"

The cause came on to be heard in the Court of Appeals, which handed down an Opinion reversing the lower Courts and dismissing the complaints (there were two plaintiffs) with costs. 275 N. Y. 258. The plaintiffs, faced now with final orders, and judgments on remittitur entered pursuant to them, appealed to this Court. Probable jurisdiction was noted, and after argument and due deliberation the judgments were affirmed. 303 U. S. 573.

If the present petitioner had pursued this course, and persuaded the Appellate Division to certify a question, he might well have prevailed in the Court of Appeals.

There are ample precedents for dismissing a writ of certiorari once granted if, upon the argument, it appears that State remedies have not been exhausted. See *Gorman* v. *Washington University*, 316 U. S. 98 (1942).

POINT II

The limitation upon this Court's power of review to the review of final orders should be adhered to upon the facts of this case. The departure from the rule sanctioned in criminal appeals (*e.g.*, *Griffin* v. *Illinois*, 351 U. S. 12) should not be extended to cases where the issues do not touch the merits of the controversy.

(1)

That orders, which were entered after the controversy had been adjudicated on the merits and which relate only

to the enforcement of an antecedent final judgment, are not final orders within the jurisdiction of the Court of Appeals of New York, is a principle thoroughly established in the jurisprudence of that Court.

In *Knickerbocker Trust Co.* v. *Oneonta, etc., Ry. Co.*, 197 N. Y. 391 (1910), a railroad had been sold upon the foreclosure of a mortgage upon it. The purchaser defaulted, and a new sale was made. It was held that a decision of the Appellate Division refusing to order the previous purchaser, who had defaulted, to join in a deed to the new purchaser was not appealable to the Court of Appeals, since it was not a final order. The Court said (p. 393):

> "Such an application on the foot of the decree would be a proceeding incidental and auxiliary to the judgment itself, and the order made in response thereto would simply be a direction made by the court for the purpose of carrying out and enforcing rights already settled and determined by and under the judgment. The proceeding would not be one addressed to the prosecution of any new or independent rights, but would simply call on the court to enforce those already adjudicated. (*Merriam* v. *Wood & Parker Lith. Co.*, 155 N. Y. 136, 139; *Jewelers' Merc. Agency* v. *Rothschild*, 155 N. Y. 255; *People* v. *Amer. Loan & Trust Co.*, 150 N. Y. 117, 123, 124.)"

The principle of the case just cited was summed up in concise language in *Rudiger* v. *Coleman*, 206 N. Y. 412 (1912), where the Court held it had no jurisdiction of an appeal from an order which was "one made in the action on an application incidental and auxiliary to the judgment and for the purpose of regulating, carrying out and enforcing rights already settled and determined by and under the judgment * * *" (p. 415).

The principle has been applied to a case where the Appellate Division vacated an order for civil arrest. *Matter of Patino* v. *Patino*, 307 N. Y. 910 (1954

In a case involving an order for body execution, the Court dismissed the appeal but took pains to admonish the appellant that the Court would entertain the appeal if an application were made to the Appellate Division to certify a question. *Chase Watch Corp.* v. *Heins*, 283 N. Y. 564 (1940). That is precisely the procedure which we suggested in Point I, *supra*, should have been followed here.

(2)

The provisions of 28 U. S. C. § 1257 limit the power of this Court, in reviewing decisions of State courts of last resort, to the review of final orders. An exception was made in *Griffin* v. *Illinois*, 351 U. S. 12 (1956), because the denial by the Supreme Court of Illinois of leave to prosecute an appeal in a felony case *in forma pauperis* meant, in substance, that equal justice was not provided for rich and poor alike (p. 16), resulting in a denial of the equal protection of the law. "In criminal trials a State can no more discriminate on account of poverty than on account of religion, race or color" (p. 17).

It is manifest from the facts of the instant case that that is not the situation here.

For cases where this Court has insisted that the decision of a State Court, not to be reviewed by certiorari or appeal, shall be final, see *Bruce* v. *Tobin*, 245 U. S. 18 (1917); *Bacon & Sons, Inc.* v. *Martin*, 302 U. S. 642 (1937); *Natural Gas Co.* v. *Oklahoma*, 334 U. S. 62, 68 (1948); *Montgomery Building & Construction Trades Council* v. *Ledbetter*, 344 U. S. 178 (1952). For a statement of general principles where the review is of a United States Court of Appeals, see *DiBella* v. *United States*, 369 U. S. 121, 125-126 (1962).

POINT III

New York Civil Practice Act, § 764, in allowing a body execution against one who has failed to comply with a judgment for the payment on money does not contravene either the Eighth or the Fourteenth Amendment.

New York Civil Practice Act, § 826 provides:

> "§ 826. *Right to arrest depending upon the nature of the action.* A defendant may be arrested in an action, as provided in this and the next article, where the action is brought for either of the following causes:
>
> * * *
>
> 5. To recover damages for fraud, or deceit."

Civil Practice Act § 764 provides that "an execution against the person of a judgment debtor may be issued by the court or a judge or justice thereof, upon application by the judgment creditor in a case * * * where the plaintiff's right to arrest the defendant depends upon the nature of the action"—an implicit cross-reference to § 826, *supra*.

Body execution for failure to pay a judgment premised upon fraud or deceit on defendant's part is not an isolated statutory phenomenon peculiar to New York State. Twenty-five States authorize body execution under these circumstances. For a list of them, we beg leave to refer the Court to *Index-Digest of State Constitutions*, 2nd Ed., p. 531 (compiled by Legislative Drafting Research Fund of Columbia University, 1959).

Where such provisions of law have been challenged as violative of the federal constitution, they appear to have been uniformly upheld, upon the principle, stated *obiter* to be sure, in *Matter of Reeves* v. *Crownshield*, 274 N. Y. 74, 79 (1937):

> "Without this right, there would be no power in the court to enforce its order. To compel the judgment debtor to obey the order of the court is not imprisonment for debt, but only imprisonment for disobedience of an order with which he is able to comply."

In *Tatlow* v. *Bacon*, 101 Kan. 26, 165 Pac. 835 (1917), the Court in upholding a statute providing for execution against the person challenged as contravening various portions of the Federal Constitution (especially the Eighth Amendment), the Court said (p. 30):

> "It is insisted by the defendant that the statute is bad for the reasons stated and also because it imposes cruel and unusual punishment. It has been held in many cases that such statutes are not violative of the provision prohibiting deprivation of liberty without due process of law or the one forbidding cruel and unusual punishment. *Light* v. *Canadian County Bank*, 2 Okla. 543, 37 Pac. 1075; 5 C. J. 438."

In *Harrison* v. *Caudle*, 141 S. C. 407, 139 S. E. 842 (1927), a body execution statute was upheld against a contention that it deprived the debtor of the equal protection of the laws, in that it exempted women.

In *Lipman* v. *Goebel*, 357 Ill. 315, 192 N. E. 263 (1934), the Court said (p. 319):

> "While any judgment for money, in its more comprehensive meaning, may be classified as a debt in the sense that the judgment debtor is indebted to the judgment creditor, yet the instant case does not involve a debt within section 12 of article 2 of the State constitution. That section does not relate to debts within the meaning of judgments recovered in tort actions but relates to judgments arising out of contracts, either express or implied. It particularly has no application to judgments recovered for malicious, wanton and willful tortious acts committed by the judgment debtor. *People* v. *Walker*, 286 Ill. 541; *Kennedy* v. *People*, 122

id. 649; *Kitson* v. *Farwell*, 132 *id.* 327; *Buck* v. *Alex*, 350 *id.* 167."

The petitioner, it is submitted, places an excessive and unwarranted reliance upon cases in the field of criminal law. Civil arrest is basically a device to punish "an offence against the court and against the administration of justice * * *". *Eilenbacker* v. *District Court of Plymouth County*, 134 U. S. 31, 39 (1890), a case whose authority has not been impugned over the years. See, *e.g.*, *Fisher* v. *Pace*, 336 U. S. 155, 159 (1949); *Green* v. *United States*, 356 U. S. 165, 183 (1958).

CONCLUSION

The writ should be dismissed as improvidently granted; or, in the alternative, the order under review should be affirmed.

Dated: September 11, 1963.

Respectfully submitted,

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Respondents.

On Writ of Certiorari to the
NEW YORK SUPREME COURT
Appellate Division, First Judicial Department

RESPONDENTS' BRIEF

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On Writ of Certiorari to the NEW YORK SUPREME COURT Appellate Division, First Judicial Department

RESPONDENTS' BRIEF

Proceedings Below

The petitioner, Gotthilf, was Chairman of the Board of Charge-It-Systems, Inc., a New York Corporation, which was the factor of respondent, Sills of Cambridge, Inc. The individual respondents, Benjamin Sills and Morton Sills were the principal officers and stockholders of Sills of Cambridge, Inc.

On September 24, 1959, the respondents were in debt to the United States for withholding taxes. The individual respondents were, in addition, guarantors of a debt owing from Sills of Cambridge, Inc. to Charge-It-Systems, Inc. There was a controversy as to the balance due to Charge-It-Systems, Inc.

To resolve this dispute Charge-It-Systems, Inc. by Gotthilf, the Chairman of its Board, entered into a written agreement with Benjamin Sills and Morton Sills (R. 31-33); Charge-It-Systems, Inc. undertook to accept $13,000. in full settlement of its claim against the respondents, such sum to be paid in installments, $2,500. forthwith and the balance in ten equal monthly payments.

In this written agreement, Gotthilf, Chairman of the Board, represented that Charge-It-Systems, Inc. had submitted this settlement arrangement to the Internal Revenue Service and agreed that the outstanding accounts receivable of Sills of Cambridge, Inc. would be collected by Charge-It-Systems, Inc., that such collections would be remitted to the Internal Revenue Service once a month and that the amount collected would be reported to the Internal Revenue Service twice a month.

This letter agreement acknowledged that the factor was holding $28,319.28 of accounts receivable as collateral and stipulated that Charge-It-Systems, Inc. would transfer to Morton and Benjamin Sills all unpaid accounts receivable held as collateral and outstanding at the time the $13,000 should be paid in full (R. 31-33).

The $13,000. was duly paid by Morton and Benjamin Sills (R. 8).

Charge-It-Systems, Inc. collected the accounts receivable. Once a month it sent to Sills of Cambridge, Inc.

what appeared to be copies of letters (R. 34-36) addressed to Nathan Sprintzen, Chief Special Procedure Section of the Internal Revenue Service in New York City. These letters purported to enclose remittances to The Internal Revenue Service pursuant to a letter of September 22, 1959 (R. 8).

It is a fact, nowhere contradicted, that the Internal Revenue Service had no record of a letter of September 22nd, 1959, nor of the agreement of September 24, 1959 (R. 8).

Further, the Internal Revenue Service never received the originals of the copies of letters from Gotthilf, Chairman of the Board. Finally, it never received one single payment from Gotthilf, or Charge-It-Systems, Inc. (R. 8).

Benjamin Sills, Morton Sills and Sills of Cambridge, Inc. thereupon instituted an action against Charge-It-Systems, Inc. and Morris Gotthilf in the Supreme Court, New York County, seeking to recover damages for fraud (R. 8).

The answer (R. 40) asserted affirmative defenses and counterclaims, but by failing to deny, admitted that the covering letters and remittances were never sent to the Internal Revenue Service.

Plaintiffs' Reply (R. 43, 44) denied the affirmative allegations of the answer.

Plaintiffs thereafter served a notice to examine Charge-It-Systems, Inc. and Morris Gotthilf before trial returnable October 27, 1960. The defendants defaulted.

Plaintiffs' attorney telephoned Archibald Palmer, defendants' then attorney, during the course of the day and was told that defendants had not appeared because they did not intend to take further action in the case.

Plaintiffs' attorney duly served a notice of motion to strike the answer and counterclaims of defendants because of their deliberate default. The defendants defaulted on the return day.

On November 16, 1960, an order was duly made striking the answer and counterclaims. A copy of this order was duly served on defendants' attorney.

Thereafter plaintiffs' attorney served defendants' attorney with a notice of motion for an inquest in this action, returnable January 9, 1961. Defendants defaulted on January 9, 1961.

An order was then made setting the case down for inquest and a copy was duly served on defendants' attorney with a notice of inquest for February 9, 1961.

At this point the defendants, appearing by Mr. Palmer, moved to vacate the order directing an inquest. His preposterous contention that plaintiffs' attorney had agreed orally to take no further action against the petitioner, Gotthilf, was not accepted by the Court. The application was denied on March 10, 1961.

Plaintiffs then appeared in the Supreme Court, New York County, on May 9th, 1961, to proceed with the inquest (R. 5). The date had been delayed because adjournments had been requested by Mr. Palmer, who represented that his client, Gotthilf, was travelling out of the country.

The inquest was taken before Mr. Justice Carney. Mr. Palmer, defendants' attorney, personally appeared in Court. He was afforded the opportunity to participate in the proceedings. He refused to take part and left the courtroom (R. 8).

After hearing the testimony of Benjamin Sills and Nathan Sprintzen of the Internal Revenue Service, Justice

Carney awarded plaintiff, Sills of Cambridge, Inc. damages in the sum of $17,408.77 for defendants' fraud and deceit (R. 8), and a judgment was accordingly entered for that sum plus interest, costs and disbursements, in the total sum of $19,294.38 (R. 5).

Defendants then appealed from this judgment to the Appellate Division of the Supreme Court, New York County. The notice of appeal was served and filed by Mr. Palmer on their behalf. The judgment was affirmed without opinion (R. 11).

An execution was thereupon issued against the property of the petitioner and his co-defendant. It was returned unsatisfied (R. 5).

Thereafter the judgment-creditor (respondent here) moved for a body execution upon the petitioner. Notice was duly given the petitioner, his former attorney and his present attorney (R. 4). The motion came on before Justice Abraham J. Gellinoff, at Special Term of the Supreme Court, New York County. Affidavits were submitted and the issues were argued. The Court rendered an opinion (R. 44, 45) which stated in part: "Although he appeals to the discretion of the court, defendant has neglected to bare completely his present financial status and future prospects and to present any plan for payment of the judgment. The defendant will be granted an opportunity to do so by filing an additional affidavit on or before February 21, 1962. If no such affidavit is filed or if the affidavit when filed, does not appeal to the discretion of the court, the motion for the issuance of a body execution will be granted" (R. 44).

The petitioner did submit an additional affidavit (R. 21, 22). Moreover, at his request, Judge Gellinoff granted

him a further hearing at which he, his wife, his counsel and respondents' attorney were present.

Justice Gellinoff found that defendant had not convinced the court of any meritorious ground for withholding issuance of a body execution. The motion was accordingly granted and an order entered (R. 3-4).

Petitioner appealed from this order to the Appellate Division of the Supreme Court, First Department, which unanimously affirmed. Then, without asking leave either of the Appellate Division or the Court of Appeals, and without following the custom of having the question certified as one of an important constitutional nature, petitioner appealed to the Court of Appeals which dismissed his appeal because it was not an appeal from a final order (R. 2).

Statement of the Case

The order for a body execution, arising from this judgment for fraud, was issued in the discretion of the Court primarily because of the contemptuous conduct of the petitioner, Gotthilf. There is not the slightest doubt that if Gotthilf had made an honest disclosure, there would have been no order for a body execution. He literally invited such action by the Court.

Mindful that he could offer no defense to the charges of fraud asserted in the complaint without the risk of perjury, Gotthilf had deliberately suffered the defaults which have been enumerated. These defaults were calculated to serve as a basis for delay and evasion. And this course of conduct was constantly maintained by him in the proceedings for a body execution before Justice Gellinoff.

The order for a body execution did not follow automatically upon respondents' request. Affidavits were submitted by both sides and argument heard by the Court to determine whether its discretion should be exercised in favor of the application for body execution. Gotthilf swore that he would be "present and available" (R. 15) for examination in supplementary proceedings (although he has since fled the State and has been securely ensconced in Florida for many months), but offered no evidence as to his financial status or his ability or inability to pay, although then represented by new counsel.

Justice Gellinoff afforded Gotthilf a further opportunity to satisfy the Court that he was acting in good faith with the Court. Thereupon Gotthilf finally produced an affidavit (R. 21) which recited that he was without assets except income from his business. This president of the Enrolled Accountants Association of the State of New York (R. 15) averred that his net income had been $19,253.18 in 1959, $11,543.30 in 1960. There was apparently no income and an unexplained deficit of $4,523.72 in 1961. There was income of $3,177.54 in the first two months of 1962. He offered to pay 25% of his net income (R. 22) beginning two months thence, namely, April 1962, and added: "If my offer of 25% of my net income is not high enough in the Court's opinion, then I will try to comply with what the Court suggests."

His affidavit did not disclose the sources of his income, the existence of any favorable contracts, his bank accounts, his mode of living, how he paid rent for the apartment in which he lived nor did he disclose his possessions. He offered no explanation of what he had done with the $3,000 earned in January and February 1962, or of how he had

found the money to travel abroad. Gotthilf's affidavits were not candid. They were not honest. His proposal would have placed on the judgment creditors the burden of pursuing him each month, causing further and interminable dispute in the monthly computation of 25% of his net income. His invitation to the Court to suggest a higher offer was typically arrogant and cavalier. This was no honest debtor truthfully disclosing his assets. Gotthilf proposed to enter into a game with the Court and Justice Gellinoff properly declined the invitation. This contemptuous conduct under all the circumstances, fully warranted the order for a body execution.

The petitioner concedes at page 40 of his brief, as well he must, that Justice Gellinoff did not abuse his discretion under the law of the State of New York. To deny this right to the Court under these circumstances would be to rob it of a fundamental and necessary power.

Question Presented

The question presented is not, as stated by the petitioner, the simple issue of whether a body execution to enforce collection of a debt violates the due process clause.

It is rather: Is the due process clause violated by Section 764 of the New York Civil Practice Act as applied in the instant case where the judgment was founded in fraud and where the debtor has refused to make an honest, complete disclosure of his assets and earnings in defiance of the Court.

Summary of Argument

I. Section 764 of the New York Civil Practice Act provides for a body execution in the Court's discretion in cases of fraud. This is a reasonable remedy to a defrauded creditor.

A. Section 764 of the Civil Practice Act as applied by the New York Courts and in this case, does not impose imprisonment for debt.

B. The granting of a body execution against a judgment-debtor in an action based on fraud, is not considered imprisonment for debt.

II. The due process clause of the Fourteenth Amendment does not apply.

A. Those practices which have been declared contrary to due process are radically different from the instant procedure.

B. Procedures like the instant one, which are consistent with a State's needs and which are based on a tradition which continues to have present validity are not unconstitutional.

III. New York's procedure is in accord with Federal policy.

A. The Federal law of imprisonment for debt in the Federal Courts, follows the remedies provided by the States.

B. A procedure very similar to the instant one has been accepted by the Supreme Court in its supervision over the Federal Bankruptcy Courts.

C. The Supreme Court has refused to alter State remedies, which have a strong local purpose, even when it has been alleged that they conflict with Federal policy.

IV. The petitioner has failed to exhaust the remedies available to him under New York Law.

ARGUMENT

POINT I

Section 764 of the New York Civil Practice Act provides for a body execution in the Court's discretion in cases of fraud. This is a reasonable remedy to a defrauded creditor.

A. Section 764 of the Civil Practice Act as applied by the New York Courts and in this case, does not impose imprisonment for debt.

Between 1874 and 1936 execution against the person of a judgment-debtor was allowed in New York in certain actions simply by the order of the plaintiff's attorney and without any need for a Court application or hearing. *Williams* v. *Smith*, 171 Misc. 501, 502, 12 N. Y. S. 2d 124, 125 (N. Y. C. Ct. 1939). In 1936, Section 764 was amended to require application to the Courts for this remedy which was to be granted on the same grounds as before except that the application was to include "such other matters as the Judge, Justice or Court issuing the same may require." New York Civil Practice Act Sec. 764 as amended New York Laws of 1936 Chapter 279. Some Courts interpreted this difference to mean that the application was to be granted or denied according to the Court's "sound discretion". However, the weight of authority was that the amendment in Section 764 was only meant to prevent the abuse of process which had occurred when executions were in the hands of attorneys and was not meant to give a Judge the discretion to deny the body execution in any case where it was authorized by statute. *White* v. *Denny*, 258 App. Div. 144, 15 N. Y. S. 2d 849 (1st Dept. 1939).

In 1940 Section 764 was again amended to its present form which provides for the exercise of judicial discretion. New York Civil Practice Act Sec. 764 as amended New York Laws of 1940 Chapter 552. This amendment was construed to have changed the rule of *White* v. *Denny*, *supra*, and to have given the Courts the duty to look into all pertinent circumstances including the judgment-debtor's ability to pay his obligation and the nature of the wrong for which the judgment had been recovered. In *Spruce* v. *Aronson*, ... Misc. ..... ; 43 N. Y. S. 2d 958 (S. Ct. 1943), it was stated that "It is not the purpose of a body execution to enforce the collection of a debt by imprisonment" and that such an execution would be denied in the Judge's discretion when "The judgment was not obtained as a result of a malicious, wanton or intentional injury." In *Zeidner* v. *Sakal*, 194 Misc. 642, 90 N. Y. S. 2d 461 (S. Ct. 1949), although a body execution was denied, leave was given to the plaintiff to apply later if the defendant showed "unco-operative, obstructive or other prejudicial conduct."

The trend in New York public policy, as evidenced by the change in Section 764 against imprisoning persons for obligations which they were incapable of discharging was noted in *Application of Chassman*, 1 Misc. 2d 766, 147 N. Y. S. 2d 765 (C. Ct. 1955) where the Court refused to imprison an indebted trustee for contempt. The Judge relied on the judicial construction of Section 764 to make inability to comply the significant factor in the exercise of his discretion not to imprison the defendant. In *American Guar. and Liab. Ins. Co.* v. *Conran*, ... Misc. ....., 140 N. Y. S. 2d 333 (S. Ct. App. Term 1955) where it was found that the defendant could pay fifty dollars a month instead of the twenty-five he was then paying, the Court

allowed a body execution in its discretion unless the defendant paid the larger amount.

Thus it can be seen that Section 764, as construed by the New York Courts, does not authorize a body execution in cases where the defendant is incapable of paying but only in cases where he is found to be engaging in practices which show an absence of good faith in his dealings with the judgment-creditor.

The case now before the Court does not show any deviation from this rule. The defendant was given ample opportunity to act in good faith with the Court and his creditor (R. 44, 45). The Special Term Justice, who had an opportunity to observe the attitude and demeanor of the defendant decided that he was not acting in good faith and was concealing the nature and amount of his assets (R. 45). The Appellate Division unanimously affirmed the trial justice's opinion and the exercise of his discretion (R. 46).

It cannot be said that the body execution simply issued to enforce the collection of a debt. It issued because the Special Term Justice found no merit to the defendant's position and disbelieved his assertion concerning his property. In this sense the execution was in the nature of a civil contempt order. When a body execution is issued as a matter of right without a Court having the obligation to look into the debtor's ability to pay, then it is simply to enforce the collection of a debt and imprisonment is used as a coercive measure in a matter which is strictly between two private parties.

However, once the Court is given the discretion to look into the matter and the course of the law provides that

imprisonment will not be ordered if the defendant cannot pay and has not wrongfully concealed his assets and has made a full and complete disclosure to the Court. The Judge may issue the execution only for what it considers a lack of good faith and respect in a matter which is no longer between two private persons but now involves the Court. It is this which makes the order for imprisonment more a committal for contempt than a traditional body execution even though the old terms continue to be used.

B. The granting of a body execution against a judgment-debtor in an action based on fraud is not considered imprisonment for debt.

The Constitutions or Statute law of almost all of the States have abolished imprisonment for debt. 16 C. J. S. 1004 (1956); NOTE, Present Status of Execution against the Body of the Judgment Debtor, 42 Iowa L. Rev. 306, 307-11 (1957). It has been generally agreed among Courts of the Several States that the provisions abolishing imprisonment for debt "were adopted to protect the poor but honest debtor who is unable to pay his debts and were not intended to shield a dishonest man who takes unconscionable advantage of another". *In re Trombley*, 31 Cal. 2d 801, 809, 193 P. 2d 734, 740 (1948). Thus it has been generally agreed that the "debts" for which imprisonment is forbidden are those which have arisen from contractual arrangements and not those which are based on damages recovered in actions ex delicto, 21 Am. Jur. 331 (1939); NOTE, Constitutionality of imprisonment for Debt, L. R. A. 1915 B 646.

There has been a concern in many of the commercial jurisdictions for giving a defrauded creditor as well as the State a remedy against a fraudulent debtor. This is even reflected in the Federal Bankruptcy Act which refuses to allow a bankrupt to discharge his fraudulent debt, 11 U. S. C. Sec. 35(a) (2), (4) (1958); *Forsyth* v. *Vermeyer*, 177 U. S. 177 (1900). It is singularly noteworthy that Mr. Justice Jackson found it pertinent to remark that "fraudulent bankruptcies probably present more difficulties to the Courts in the Second Circuit than elsewhere." *Maggio* v. *Zeitz*, 333 U. S. 56 at 58 (1948).

In the Constitutional guaranties against imprisonment for debt almost half of the States specifically exclude cases of fraud. NOTE, 42 Iowa L. Rev. 306, 308 n. 18. Indeed the statute of England, which abolished that imprisonment for debt, explicitly refused to give the fraudulent debtor the benefit of its provisions. 32 and 33 Vict. Chapter 62 (1868). The protection of deceived creditors and the deterrence of fraud have been said to lie at the foundation of a State's decision to give the defrauded creditor this remedy. Unless such creditors are protected, the fraudulent debtor is likely to have less respect for the law and the judgment against him; and by his failing to act in good faith, the judgment becomes a mere piece of paper, and the Court's authority a mockery. Bushman and Mayersohn, Civil Arrest and Execution Against the Person, 12 Albany L. Rev. 17, 32 (1948); *Reeves* v. *Crownshield*, 274 N. Y. 74, 78-80, 8 N. E. 2d 283, 284-85 (1937).

Considering the exclusion of cases of fraud from many constitutional or statutory guaranties against imprisonment for debt and the rationale of protection and deterrence behind this, it is difficult to see how Section 764 can be

characterized as a denial of due process of law. "The tyranny of labels" Justice Cardozo wrote in *Palko* v. *Connecticut*, 302 U. S. 319, 323 (1937) "must not lead us to leap to a conclusion that a word which in one set of facts may stand for oppression or enormity is of like effect in every other." Even if the imprisonment of persons only for their fraudulent debts violated due process (see *Tatlow* v. *Bacon*, 101 Kan. 26, 165 Pac. 835 (1917)), New York and many other jurisdictions which provide for body execution will not allow the imprisonment of anyone who is incapable of discharging his debt. *McDonnel* v. *Wayne*, 222 Mich. 516, 522, 193 N. W. 283, 285 (1923); Buschman and Mayersohn, 12 Albany L. Ref. 17 at 34, 37.

POINT II

The due process clause of the Fourteenth Amendment does not apply.

A. Those practices which have been declared contrary to due process are radically different from the instant procedure.

Stated generally, the Supreme Court has only found as unconstitutional, under the due process clause of the Fourteenth Amendment, practices which "violate a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Palko* v. *Connecticut*, 302 U. S. 319 at 325-26. It has upheld all exercises of state power which are consistent with the "fundamental principles of liberty and justice which lie at the base of our civil and political institutions." *Palko* v. *Connecticut*, *supra*, at 328. This has been a difficult test to apply but

as Mr. Justice Cardozo remarked in outlining this test "there emerges the perception of a rationalizing principle which gives to discrete instances a proper order and coherence". *Palko* v. *Connecticut*, *supra*, at 325.

The application of the due process clause of the Fourteenth Amendment has not remained the same but has changed over the years to reflect the shifting mores and ideals of a democratic society. Due process has come to mean more than simply an orderly course of proceedings before an impartial judge, *Tumey* v. *Ohio*, 273 U. S. 510 (1927) and freedom from physical torture, *Brown* v. *Mississippi*, 297 U. S. 278 (1936) and a biased jury (*Irvin* v. *Dowd*, 366 U. S. 717 (1961). For instance, when it has been found that the right to be protected against unreasonable searches and seizures, applicable to the States by the Fourteenth Amendment, *Wolf* v. *Colorado*, 338 U. S. 25 (1949) could not be enforced properly except by the exclusion of illegally seized evidence, precedent was overruled and the Federal exclusionary rule, *Weeks* v. *United States*, 232 U. S. 383 (1914) was also made applicable to the States. *Mapp* v. *Ohio*, 367 U. S. 643 (1961). Likewise a procedure which made a criminal defendant in a capital case, incompetent to testify in his own behalf except by an unsworn statement, was declared to be a denial of the assistance of counsel. *Ferguson* v. *Georgia*, 365 U. S. 570 (1961). This, in a prior case, had been held to be one of the fundamental rights which due process required the States to respect. *Powell* v. *Alabama*, 287 U. S. 45 (1932). Even there a majority of the Court refused to declare as a violation of due process the actual incompetency of a criminal defendant as a witness, even though there was only one State in the common law world which retained this archaic

disqualification. In another case it was declared to be cruel and unusual punishment, another constitutional guarantee which the States had to respect (see *Louisiana* v. *Resweber*, 329 U. S. 459 (1947)), to imprison a man for being a drug addict, *Robinson* v. *California*, 370 U. S. 660 (1962). The modern medical opinions that drug addiction was a disease, the fact that only a few States made such a condition criminal and the similarity of this practice with the old method of punishing the insane were the relevant considerations which drew the Court to declare this law to violate due process.

On the other hand the Supreme Court has not been oblivious to the fact that the United States is a federal system with all the States free to a great extent to cope with their particular problems in any manner which they consider fit. Dowling, Cases on Constitutional Law, 599-607 (6th ed. 1959). Thus it was held that an appeal by the State in a criminal case was not a denial of due process even though this might not be allowed where the United States found itself to be the prosecuting government, *Palko* v. *Connecticut*, 302 U. S. 319 at 325-326. It has also been held that an acquittal in a United States Court did not bar a future prosecution by a State for the same crime. *Bartkus* v. *Illinois*, 359 U. S. 121 (1959). Neither was it a denial of due process for a State to allow a negative comment on a criminal defendant's failure to take the stand even though the Fifth Amendment guarantee against self incrimination would protect the accused in a Federal Court against such a practice. *Adamson* v. *California*, 332 U. S. 46 (1947). In some of these cases there were strong dissents. See *Adamson* v. *California*, *supra*, Mr. Justice Black dissenting, and strong historical authority for dis-

allowing these practices. See *Bartkus* v. *Illinois, supra,* Mr. Justice Black dissenting. It would be hard to deny that respect for State judgment in the exercise of its police power played a great part in forming the majorities in these cases. See *Bartkus* v. *Illinois, supra.*

It is difficult to see how the instant procedure which allowed a full opportunity for the appellant to present his case in the trial of the basic issues and which later gave him an adequate chance to act in good faith with the Judge and thus avoid the body execution can be compared with methods which have been found to be unconstitutional. It cannot be said that the order for a body execution in this case violated "fundamental principles of liberty and justice which lie at the base of our civil and political institutions". This was not a case where an old discredited practice abandoned in all other jurisdictions was enforced to deprive appellant of his constitutional rights. *Cf. Ferguson* v. *Georgia,* 365 U. S. 570 (1961). Nor was he punished for what the weight of modern authority would call a disease. *Cf. Robinson* v. *California, supra.* It would appear that this practice, accepted by half of the States, would be much more reasonable and therefore more acceptable than those forms of double jeopardy which have been allowed especially since ability to comply is so important in the application of Section 764.

B. Procedures like the instant one, which are consistent with a State's needs and which are based on a tradition which continues to have present validity are not unconstitutional.

The petitioner has added to his brief sections from the newly enacted Civil Practice Law and Rules of the State of New York which carry over Section 764 of the Civil Practice Act into the newly enacted law and rules. After years of study, review and revision, the people of the State of New York, a highly commercial jurisdiction, deemed it necessary to retain the provisions of Section 764 although in a somewhat different form.

Courts seldom disturb procedures adopted and continued over the years as still fitted to the States' own particular circumstances. See *Coler* v. *Corn Exchange Bank*, 250 N. Y. 136 (1928). A Delaware practice requiring a defendant in a foreign attachment action to post special bond to satisfy any eventual judgment before being allowed to defend on the merits, when challenged as being contrary to due process, was upheld by the Supreme Court. *Ownby* v. *Morgan*, 256 U. S. 94 (1921). The Court found that the practice was a custom of England which was adopted in many States at the time of independence as being fitted to their circumstances. As to the hardship which the rule caused to the defendant the Court stated:

> "However desirable it is that the old forms of procedure be improved with the progress of time, it cannot rightly be said that the Fourteenth Amendment furnishes a universal and self-executing remedy. Its function is negative, not affirmative, and it carries no mandate for particular measures of reform."

In addition to the constitutional principle that due process demands deference to "fundamental principles of liberty and justice" there is also the historical standard of due process requiring a practice to conform to "those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country. *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 Howard 272, 276-77 (1855). Imprisonment for debt was established in all the colonies and remained after the Revolution. See, *e.g.*, Shaiman, The History of Imprisonment for Debt and Insolvency Laws in Pennsylvania as They Evolved from the Common Law, 4 Am. J. Legal History 205 (1960); Note, *supra*, 42 Iowa L. Rev. 306. When agitation against it was occurring in England the United States was also affected. The Stilwell Act abolishing imprisonment for debt in New York was one of the leading legislative efforts of reform. The English concern for the prevention of fraud was manifested likewise in the United States. While fraud is still of major concern in the debtor creditor relationship, the collection of judgments has become of primary importance because of the ease with which a debtor can fraudulently conceal his assets. See *Reeves* v. *Crownshield*, 274 N. Y. 74, 76, 8 N. E. 2d 283, 284-85 (1937), citing Levien, The Collection of Money Judgments, N. Y. Leg. Doc. No. 50F (1934).

Section 764 of the New York Civil Practice Act is an attempt to deal with both of these problems. It is a fair attempt because it gives the creditor an effective remedy against the deceitful while giving the debtor a chance to

show that he is willing to make amends. Even after imprisonment the fraudulent debtor is not remediless for he may apply for his discharge by doing exactly what he failed to do before the Court issued the execution. New York Debtor and Creditor Law, Art. 5, Secs. 120-137. The statute on its face requires imprisonment for three months. New York Debtor and Creditor Law, Art. 5, Sec. 122. But it has been construed as not being vindictive and there are cases discharging fraudulent and other wrongful debtors when they have done what they could and where continued imprisonment would serve no useful purpose. *Sam Kass Corp.* v. *Kass*, 165 Misc. 858, 1 N. Y. S. 2d 783 (Municipal Ct. N. Y. C. 1937); *In re Snyder*, 155 Misc. 616, 280 N. Y. S. 257 (Sup. Ct. 1934), affd. per curiam 244 App. Div. 784, 280 N. Y. S. 259 (1st Dept 1935).

When all the relevant factors are considered, it would appear that the instant procedure is a reasonable course of action by a commercial jurisdiction to prevent and to protect its inhabitants against fraud and the fraudulent concealment of assets and to preserve the authority of its judgments and courts. The appellant did not show any respect for this legitimate concern of the State. He wilfully defaulted in the trial of the issue of his fraud. When the time came for him to make a full disclosure of his means and give a reasonable plan to pay the judgment he persisted in arguing issues which had already been decided against him and abandoned the pertinent issue of his present good faith.

It would be difficult to imagine, under the due process clause of the Fourteenth Amendment, how a State could be denied the power to give an effective remedy to a defrauded creditor and to preserve the dignity of its

Courts against those who have respect for neither. The paucity of cases which have arisen under Section 764 is an added indication that it is not oppressive and generally accomplishes its purpose of forcing wrongdoers to make amends, so far as they are able, to those they have wronged.

POINT III

New York's procedure is in accord with Federal policy.

A. The Federal law of imprisonment for debt in the Federal Courts, follows the remedies provided by the States.

Imprisonment for debt is abolished as a remedy in the Federal Courts on the same basis including any modifications, conditions or restrictions as it has been abolished in the State in which the Federal Court sits, 28 U. S. C. Sec. 2007(a) (1958). State procedures are also followed as to any jail liberties or other privileges which an imprisoned debtor enjoys in such a State, 28 U. S. C. Sec. 2007(b) (1958). This law has been interpreted to give suitors the same remedies regardless of whether they choose to sue in State or Federal Courts. *Hayes* v. *Canada A. & P. S. S. Co.*, 184 Fed. 82 (1st Cir. 1911); *Low* v. *Durfee*, 5 Fed. 256 (C. C. Mass. 1880); *U. S.* v. *Walsh*, 28 Fed. Cas. No. 16,635 (D. Or. 1867). The policy of respecting the State's remedies which is embodied in this provision was further strengthened in 1939 when the Federal Rules of Civil Procedure were adopted. Rules 64 and 69. The Rules, whose main function was to provide a unified practice in the Federal Courts, made arrest and body execution

conform with the local State practice. From this it can be seen that after 1839 when the first Federal statute was passed conforming the Federal Courts to State procedures, 5 Stat. 321 (1839) it has been the Federal policy to follow the States as regards execution against the person. The recent changes promulgated by this Court in the Federal Rules contained no alterations in this area and indicated that there is no current policy for changing the Rules which adopt State remedies in the Federal Courts.

B. A procedure very similar to the instant one has been accepted by the Supreme Court in its supervision over The Federal Bankruptcy Courts.

The Supreme Court has often had before it the problem of the legality of imprisoning a bankrupt for contempt for failure to turn over assets which have been determined in a civil proceeding to be wrongfully in his possession. In such a case the bankrupt is said to carry the keys to the jail in his own pocket for he need only comply with the order to gain his release. *Maggio* v. *Zeitz*, 333 U. S. 56 (1948) citing *Penfield Co.* v. *SEC*, 330 U. S. 585, 590 (1947). The possibility of mistake as to his ability to comply has been recognized but has not stood in the way of the use of the remedy of civil contempt in these cases. *Maggio* v. *Zeitz*, *supra*; *Oriel* v. *Russell*, 278 U. S. 358, 365-66 (1929). Although there was some controversy over the burden of proof in both the proceeding prior to the turnover order and in the contempt proceeding itself (compare *Stuart* v. *Reynolds*, 204 F. 709, 717-719 (5th Cir. 1913) with *In re Epstein*, 206 F. 568, 570 (D. Pa. 1913) it has never been decided that the "beyond a reasonable doubt" test of crimi-

nal cases applied here. Such a contention was in fact expressly rejected by this Court. *Oriel* v. *Russell, supra.* Once the bankrupt was found to have possession of wrongfully withheld assets it was held that he must make some effort to convince the judge in the contempt proceeding that present compliance was impossible. *Maggio* v. *Zeitz, supra; Oriel* v. *Russell, supra; Mueller* v. *Nugent*, 184 U. S. 1 (1902). Just as in the instant procedure (see Justice Gellinoff's first opinion (R. 44-45)), the bankrupt is given a chance to prove that he no longer has the power to obey the Court. The following from Chief Justice Taft's opinion in *Oriel* v. *Russell, supra*, is appropriate as to whether the bankrupt's bare assertion need be considered as in good faith or not by the presiding judge. See Gotthilf's affidavit (R. 21, 22) and Charnas' answering affidavit (R. 23, 24).

> "But it is also true that the assertion may not be believed, and that the bankrupt may therefore be subjected to the usual pressure that follows willful disobedience of a lawful command, namely, the inconvenience of being restrained of his liberty."

The principles of *Oriel* v. *Russell, supra*, were reaffirmed in *Maggio* v. *Zeitz, supra*, which made the present ability of the bankrupt to comply, the touchstone of this whole contempt practice.

There is a great similarity between the application of Section 764 and the turnover procedure referred to above. The addition of the judge's discretion in Section 764 makes the proceeding in the nature of a civil contempt. This can be seen by the interchangeability of orders ordinarily used only for contempt in Section 764 proceedings and the use of a Section 764 judicial discretion in a proceeding for contempt. The singular difference is that Section 764 only

applies to certain types of action while contempt proceedings deal with every action where a court seeks to enforce its orders, primarily for the benefit of a private party but also to preserve its authority.

If the Supreme Court in its supervisory power allows imprisonment for failure to comply with civil turnover orders, surely this same Court will not hold unconstitutional a similar practice conducted for essentially the same purposes in a State. Compare *Mallory* v. *United States*, 354 U. S. 499 (1957) with *Stein* v. *New York*, 346 U. S. 156 (1953).

C. The Supreme Court has refused to alter State remedies, which have a strong local purpose, even when it has been alleged that they conflict with Federal policy.

In *In Re Kessler*, 369 U. S. 153 (1962) the Supreme Court let stand a State remedy which was said to conflict with the policy behind the Federal Bankruptcy Act. The State of Utah made it possible for the victim of a negligent driver to suspend the driver's automobile license until a judgment based on the accident was paid. There was a provision in the statute making this possible even if the judgment-debtor had received a discharge in bankruptcy which would ordinarily relieve him of the judgment debt. To the claim that the Utah statute was contrary to the policy behind the bankruptcy law allowing a fresh start in life, Mr. Justice Frankfurter wrote for the majority:

> "A State may properly decide, as forty-five have done, that the prosepect of a judgment that must be paid in order to regain driving privileges serves as a substantial deterrent to unsafe driving."

Section 764 serves as a deterrent to those who would defraud others and then seek to evade a judgment recovered against them. It also serves to protect those who are the victims of such fraudulent schemes. It cannot be said that these would not be sufficient to withstand the hostility of the Federal Courts to execution against the person. However, it is submitted that there is no such hostility and that the Federal Courts have followed the States in applying these remedies and show concern, as do the States, that lawful judicial orders be obeyed in good faith and to the best of the ability of those to whom they are directed.

POINT IV

The petitioner has failed to exhaust the remedies available to him under New York Law.

We respectfully refer to the brief of the Attorney General of the State of New York, *Amicus Curiae*.

CONCLUSION

Section 764 of the Civil Practice Act which allows a body execution against a fraudulent debtor who refuses to show the Court that he is now acting in good faith, is consistent with the due process clause of the Fourteenth Amendment.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1963

No. 50

MORRIS GOTTHILF,

Petitioner,

against

BENJAMIN SILLS, MORTON SILLS and SILLS OF CAMBRIDGE, INC.,

Respondents.

On Writ of Certiorari to the Appellate Division of the Supreme Court of the State of New York, First Judicial Department

PETITIONER'S REPLY BRIEF

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IN THE

Supreme Court of the United States

October Term, 1963

No. 50

MORRIS GOTTHILF,

Petitioner,

against

BENJAMIN SILLS, MORTON SILLS and SILLS OF CAMBRIDGE, INC.,

Respondents.

On Writ of Certiorari to the Appellate Division of the Supreme Court of the State of New York, First Judicial Department

PETITIONER'S REPLY BRIEF

Statutory Provisions Involved

New York Civil Practice Act (CPA)

"**§588. Appeal as of right.** Appeal to the court of appeals as of right lies only

1. from a judgment or order of the appellate division, provided that the judgment finally determine an action, or the order finally determine a special proceeding, and provided further that

(a) there be directly involved the construction of the constitution of the state or of the United States; or

(b) the action or proceeding was originally commenced in the supreme court, a county court, a surrogate's court, the court of claims, or an administrative agency, and

(i) one or more justices of the appellate division dissent from its decision; or

(ii) the appellate division direct a reversal or modification of the judgment or order appealed from; • • •"

"§589. **Appeal by permission.** Appeal to the court of appeals by permission lies only

• • •

3. either

• • •

(b) by permission of the court of appeals upon application made directly to that court, from a judgment or order of the appellate division, or of the court of original instance, which is not appealable as of right only because it does not comply with provision (a) or (b) of subdivision one of section five hundred and eighty-eight of this act."

New York Civil Practice Law and Rules (CPLR)
(Effective September 1, 1963)

"§5601. **Appeals to the court of appeals as of right**

• • •

(b) Constitutional grounds. An appeal may be taken to the court of appeals as of right:

1. from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States; and * * *"

"§5602. **Appeals to the court of appeals by permission**

(a) Permission of appellate division or court of appeals. An appeal may be taken to the court of appeals by permission of the appellate division granted before application to the court of appeals, or by permission of the court of appeals upon refusal by the appellate division or upon direct application:

1. In an action originating in the supreme court, a county court, a surrogate's court, the court of claims or an administrative agency,

(i) from an order of the appellate division which finally determines the action and which is not appealable as of right, or * * *"

"§5611. **When appellate division order deemed final**

"If the appellate division disposes of all the issues in the action its order shall be considered a final one, and a subsequent appeal may be taken only from that order and not from any judgment or order entered pursuant to it. If the aggrieved party is granted leave to replead or to perform some other act which would defeat the finality of the order, it shall not take effect as a final order until the expiration of the time limited for such act without his having performed it."

Statement

After a final judgment (which resulted from a mistaken default order) was docketed against petitioner, he took an appeal to the Appellate Division, First Department. It unanimously affirmed without opinion. 15 A. D. 2d 458 (Dec. 7, 1961).

Thereafter Mr. Justice Abraham J. Gellinoff

> "Ordered, that execution be issued herein against the person of Morris Gotthilf, defendant herein, without notice to the said defendant." (R. 4)

Again petitioner appealed to the Appellate Division, First Department. Again it unanimously affirmed without opinion. 17 A. D. 2d 723, 212 N. Y. S. 2d 886 (Sept. 20, 1962) (R. 46).

Petitioner decided to seek further review, and it seemed clear that an appeal lay to the New York Court of Appeals. But in New York this is not the end of the problem, it is only the beginning; for New York's "finality" rule provides generally that only "final orders" are appealable to the Court of Appeals, either (a) as of right, or (b) by leave to appeal to the Court of Appeals. A "non-final" order can be appealed there only by permission of the Appellate Division as a certified question.

Thus, if the Appellate Division's order (unanimously affirming without opinion the order for body execution) was "final", petitioner belonged directly in the Court of Appeals. On the other hand, if it was a "non-final" order, he had to request the Appellate Division to certify a question, a decision wholly within the latter court's discretion.

The usual criteria for distinguishing a "final" from a "non-final" order was whether it was interlocutory and whether something more had to or could be done. Here, the action had long been over, the judgment long ago docketed; another proceeding had been commenced in the form of a motion for a body execution; it had been granted. The sheriff was searching, Gotthilf was on the run, indeed, he left the state, and the Appellate Division affirmed without opinion. Nothing remained except to find Gotthilf and jail him.

To petitioner's counsel, and most of all to petitioner himself, the body execution order represented the ultimate in finality. There was nothing more that could happen either in terms of the action or of petitioner's personal liberty. It was a logical step, then, to appeal directly to the Court of Appeals. In doing so, petitioner made sure to touch all of the procedural bases in the Court of Appeals by (a) docketing an appeal as of right, and also (b) asking that Court for leave to appeal to it—which were the only two ways for a final order to be reviewed there.

Petitioner docketed an appeal as of right in the New York Court of Appeals on the ground that §764 of the Civil Practice Act as applied in the instant case violated the Fourteenth Amendment's due process clause. Petitioner also filed a printed notice of motion for leave to appeal to the Court of Appeals supported by the printed affidavit of counsel and a printed brief. This motion was pursuant to §589, subdivision 3(b) of the Civil Practice Act.

The Court of Appeals dismissed the appeal docketed as of right and dismissed the motion for leave to appeal because "the order sought to be appealed from does not finally determine the action within the meaning of the Constitu-

tion." 12 N. Y. 2d 761, 234 N. Y. S. 2d 714, 186 N. E. 2d 563 (1962) (R. 47); 12 N. Y. 2d 792, 235 N. Y. S. 2d 379, 186 N. E. 2d 811 (1962) (R. 48). By then it was too late to ask the Appellate Division to certify a question.

Despite these rulings, it is the petitioner's position that he did everything he could reasonably be expected to do under available state procedure in order to secure a review by the highest court of the state—unless he was expected to docket appeals in every reviewing court in sight in the hope that he would not miss the right one.

Under any reasonable approach, under the written opinions of the New York Court of Appeals itself, as well as within the meaning of 28 U. S. C. §1257, Mr. Justice Gellinoff's order for body execution against the person of the petitioner was a final judgment. It was as final as any judgment could ever be. If it was a final judgment, then petitioner exhausted his state court remedies by trying to go to the New York Court of Appeals both as of right as well as by motion. If, however, by some quirk Mr. Justice Gellinoff's final order for body execution against petitioner's person is not a final judgment, then he was not entitled to go to the New York Court of Appeals as of right, and he exhausted his state court remedies by going to the Appellate Division, First Department. On either basis, petitioner exhausted his state court remedies.

ARGUMENT

POINT I

The instant writ of certiorari was not improvidently granted.

A. Petitioner has exhausted all remedies available to him under New York law.

Petitioner is astonished that New York's attorney general relies upon the Court's decision in *Gorman* v. *Washington University*, 316 U. S. 98 (1942). There the writ of certiorari was dismissed because the Supreme Court of Missouri had not heard the case, that is, because a judgment had not been "rendered by the highest court of a State in which a decision could be had". 28 U. S. C. §1257 (1958). But *Local 174, Teamsters Union* v. *Lucas Flour Co.*, 369 U. S. 95 (1962), makes it abundantly clear that if *Gorman* is in point at all, it supports the Petitioner's position: in the *Local 174* case Mr. Justice Stewart distinguished the *Gorman* case on the following ground:

> As the opinion in *Gorman* pointed out, the Constitution of the State of Missouri expressly conferred the *right* to an *en banc* rehearing by the Supreme Court of Missouri in any case originally decided by a division of the court in which a federal question was involved. It was this provision of the state constitution which was the basis for the conclusion in *Gorman* that the State of Missouri did not regard a decision by a division of the court as the final step in the state appellate process in a case involving a federal question.

Id. at 99. (Emphasis in original.) Turning to the Attorney General's brief, we find the following on page 4:

> But the 1944 constitutional amendments left unaltered the requirement in Art. VI, §7, subd. (4) that appeals from non-final orders could only be taken to the Court of Appeals *by leave of the Appellate Division*, upon a question or questions certified. The section was merely renumbered, and the crucial words are now in Art. VI, §3, subd. (4).

Brief of the Amicus Curiae, p. 4. (Emphasis added.) In other words, under New York law Petitioner does not have a *right* to have the Appellate Division's order considered by the Court of Appeals, but rather only such opportunity for review as the Appellate Division is disposed to grant. Therefore it appears that the procedural posture in which Petitioner presently finds himself corresponds precisely to the one distinguished from the *Gorman* situation by Mr. Justice Stewart in the *Local 174* decision, and that therefore he has exhausted his state remedies within the meaning of this Court's jurisdictional rule.

B. Under the previous opinions of the New York Court of Appeals, the instant order for body execution was a final order, and petitioner exhausted his state court remedies by trying to go to the New York Court of Appeals.

The New York Court of Appeals attached the label of non-finality to numerous interlocutory or intermediate orders, and to cases where something more remained to be done. A reference to the index at the rear of any recent volume of the official New York reports under *Finality of Judgments and Orders* will disclose hundreds of cases, and, as nearly as one can make out, in those designated as non-final something more had to be done. For example,

the latest bound volume of New York reports discloses these instances: *Cioffi* v. *New York*, 11 N. Y. 2d 659, 225 N. Y. S. 2d 737, 180 N. E. 2d 896 (1962) (dismissal of complaint with leave to replead); *Hunter* v. *District Attorney*, 11 N. Y. 2d 663, 225 N. Y. S. 2d 742, 180 N. E. 2d 900 (1962) (denial of motion to assign counsel); *Matter of Schildhaus*, 11 N. Y. 2d 664 (1962) (denial of motion to dismiss petition in disciplinary proceeding against attorney); *Department of Health* v. *Natural Plating Corp.*, 11 N. Y. 2d 674, 225 N. Y. S. 2d 751, 180 N. E. 2d 906 (1962) (granting motion to dismiss complaint with leave to replead); *Erbe* v. *Lincoln Rochester Trust Co.*, 11 N. Y. 2d 754, 226 N. Y. S. 2d 692, 181 N. E. 2d 629 (1962) (denial of motion to dismiss supplemental complaint); *Matter of O'Doherty*, 11 N. Y. 2d 767, 227 N. Y. S. 2d 16, 181 N. E. 2d 761 (1962) (denial of motion for leave to reargue order of disbarment); *Fernekes* v. *CMP Industries*, 11 N. Y. 2d 792, 229 N. Y. S. 2d 33, 181 N. E. 2d 773 (1962) (judgment which declared retirement and profit-sharing program discontinued); *Matter of Dormer*, 11 N. Y. 2d 797, 227 N. Y. S. 2d 37, 181 N. E. 2d 776 (1962) (denial of motion to strike matter from counterclaim); *Rosenstiel* v. *Rosenstiel*, 11 N. Y. 2d 882, 227 N. Y. S. 2d 919, 182 N. E. 2d 407 (1962) (denial of motion for temporary injunction); *Stelzner* v. *First Avenue & Seventeenth Street Corp.*, 11 N. Y. 2d 883, 227 N. Y. S. 2d 920, 182 N. E. 2d 408 (1962) (denial of motion for summary judgment); *Brooklyn Hebrew Home* v. *Ottley*, 11 N. Y. 2d 884, 227 N. Y. S. 2d 920, 182 N. E. 2d 409 (1962) (granting motion by plaintiff for an injunction *pendente lite* and denying cross motion for dismissal of the complaint).

An order for body execution is not interlocutory, it is not intermediate, and once issued nothing more needs to be done.

The New York Court of Appeals handles all so-called "finality" cases that come before it, in two ways: (a) by a short memorandum decision where almost invariably it dismisses the appeal, and (b) occasionally by a decision where it writes an opinion. It is in those rare decisions on finality where an opinion has been written that the clue is found, confirming the thesis that finality is lacking *only* where something more needs to be done.

As long ago as 1876 the New York Court of Appeals said in *Produce Bank* v. *Morton*, 67 N. Y. 199:

> "There was nothing left to be judicially determined * * * The machinery of a reference and receivership was for the sole purpose of carrying the judgment into execution, and not the foundation of any further judicial action in the case." At 203-4.

Less than a decade later the New York Court of Appeals in *Stimson* v. *Vroman*, 99 N. Y. 74, 1 N. E. 147 (1885), again said:

> "The point is taken on the part of respondents that an appeal to this Court was not authorized because the judgment of the Supreme Court was not final. But it was final so far as it pertained to any judicial action. There was to be no further exercise of judicial discretion." 99 N. Y. at 79, 1 N. E. at 148.

In *Maggi* v. *Sabatini*, 250 N. Y. 296, 165 N. E. 454 (1929), an Appellate Division judgment with reference to the disposition of certain assets in an estate had been denomi-

nated as interlocutory. The Court of Appeals actually *changed* the judgment as to these assets to a "final" one and thus made it appealable.

Percy v. *Huyck*, 252 N. Y. 168, 169 N. E. 127 (1929) involved an appeal from the Appellate Division which had modified an *interlocutory judgment*. Yet it was held appealable and final, under *Maggi, supra,* because the interlocutory judgment directed the immediate delivery of deeds and the assignment of a mortgage. Another "part" of the judgment (for an accounting) was not final.

Where the Appellate Division remitted a matter to the Public Service Commission "to proceed therewith in accordance with the opinion of this court" the Court of Appeals held such an order final if the remission was "merely for the mechanistic process of putting in force the decision of the Appellate Division." But the appeal had to be dismissed if any question of fact or law were still open for consideration or decision by the original tribunal. See, *e.g., New York State Electric Corp.* v. *Public Service Commission*, 260 N. Y. 32, 182 N. E. 237 (1932).

In a fairly recent case, *Matter of Lawyers Mortgage Co.*, 284 N. Y. 325, 31 N. E. 2d 177 (1940), the New York Court of Appeals once again explained finality in ordinary understandable terms, saying:

> "In its challenge to the jurisdiction of this court to entertain the present appeal the respondent fails to distinguish between a proceeding in which some judicial action remains to be taken, and a proceeding * * * where the result of the order which is the subject of appeal may be modified by court action at some later date in an entirely separate proceeding.
>
> * * *

> "Finality in the present proceeding * * * results from the fact that no further judicial action is either directed or contemplated by the order to be reviewed." 284 N. Y. at 331, 332, 31 N. E. 2d at 180.

It might be noted that the above quotation cites as authority Cohen & Karger, *Powers of the New York Court of Appeals*, which the amicus curiae brief of New York's attorney general relies on.

The New York Court of Appeals has also articulated the other side of the coin. For example, in *Matter of Olney*, 281 N. Y. 98, 22 N. E. 2d 252 (1939), it explained:

> "The order does not end the proceeding insofar as appellant is concerned as to any part thereof. It does not irrevocably determine its right, irrevocably change its position * * *. There still remains the necessity of further hearing in the Surrogate's Court." 281 N. Y. at 100.

Or again in *Begent* v. *Noyes*, 284 N. Y. 229, 30 N. E. 485 (1940), involving a license to sell milk, the court stated:

> "* * * it is clear that there is here a remission to the Commissioner for further proceedings, including a further or new hearing on the merits and a determination by him as to the limitations and conditions, if any, to be attached to the licensing of petitioner. The order of the Appellate Division is, therefore, not a final one." 284 N. Y. at 230, 30 N. E. 2d at 486.

From these cases it is clear that whenever the New York Court of Appeals took the trouble to discuss finality in a written opinion, it unequivocally drew a line which fortifies petitioner's position that the body execution order in this case was final. All that one has to do to see the dichotomy that exists is to compare those cases which the

Court of Appeals took as of right or allowed by leave on the one hand, and those that it refused to take. If the order or judgment in question was intermediate or interlocutory, or if something more needed to be done, it was not final.

These were the tests by which the New York Court of Appeals had in the past ruled on questions of finality. *Produce Bank* v. *Morton*, 67 N. Y. 199 (1876) was especially significant in that not unlike body execution, it was concerned with an order, the sole purpose of which was "carrying the judgment into execution," an order the court had regarded as final. The logic of *New York Electric Corp.* v. *Public Service Commission*, 260 N. Y. 32, 182 N. E. 237 (1932) was inescapable; that no question of fact or law remained open for consideration or decision by the original tribunal. Petitioner's counsel had no choice but to appeal directly to the Court of Appeals relying, when he did so, on that court's own rational interpretation of its own precedents.

POINT II

The Appellate Division's affirmance of the body execution order constituted a final order within the meaning of 28 U. S. C. §1257.

The attorney general's second contention is that the Appellate Division's affirmance of Mr. Justice Gellinoff's order does not fall within the scope of the certiorari statute, and that therefore this Court does not have jurisdiction over the controversy at this time. In reply, petitioner argues that regardless of the New York courts' view of the matter, the Appellate Division has handed down a "final

judgment or decree" within the meaning of 28 U. S. C. §1257 (1958).[1]

First, we would urge the rather obvious point that no state court decision is authority on the question of whether a given judicial determination can be reviewed by this Court on certiorari. The answer to that question can be provided only by this Court, in instances where its jurisdiction is challenged in response to a petition for a writ of certiorari or at some subsequent stage in the proceedings. Hence the attorney general's reliance upon cases like *Chase Watch Corp* v. *Heins*, 283 N. Y. 564, 27 N. E. 2d 282 (1940) (mem.) (page 7) and *Rudiger* v. *Coleman*, 206 N. Y. 412, 99 N. E. 1049 (1912) (page 6) adds nothing to his argument. Such cases treat only the Court of Appeals' jurisdiction under New York law; they are exclusively concerned with when *that* court, not this Court, has power to review the orders of a lower tribunal.

Second, *Republic Natural Gas Co.* v. *Oklahoma*, 334 U. S. 62 (1948), cited by the attorney general on page 7, makes it clear that the Court has the power to review what has occurred below in the instant case. In *Republic*, Mr. Justice Frankfurter said, for the Court, that

> There have been instances where the Court has entertained an appeal of an order that otherwise might be deemed interlocutory, because the controversy had proceeded to a point where a losing party would be irreparably injured if review were unavailing. 334 U. S. at 68.

---

1. "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: * * * (3) By writ of certiorari * * * where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution * * * of the United States * * *."

Petitioner contends that he "would be irreparably injured if review were unavailing" today. While most cases in which the issue under discussion arises involve judicial determinations made in advance of judgment on the merits, in our case body execution was imposed only after respondent had already prevailed on the litigated points; so that while in the ordinary case the Court can decline jurisdiction safe in the assurance that the federal questions will again be presented on some later occasion, a dismissal of this writ to the Appellate Division will almost certainly result in petitioner's having lost for all time his opportunity to be heard in this Court on the constitutional contentions he has raised. As we showed under Point I, not even the New York Court of Appeals will be able to pass on the constitutional issues unless the Appellate Division agrees to grant an application for leave to appeal upon certified questions.

With all this in mind, we respectfully submit that if petitioner is to receive justice under the Constitution, it must be today or not at all.

POINT III

The constitutional argument made by the *amicus curiae* is without merit.

Point III of the Attorney General's brief argues that Section 764 of the New York Civil Practice Act does not violate either the Eighth or the Fourteenth Amendment to the Constitution. Petitioner will show that the cases the attorney general relies upon lend no weight whatever to his contention.

The case of *Eilenbecker* v. *District Court of Plymouth County,* 134 U. S. 31 (1890), cited on page 10 in support of the notion that "civil arrest is basically a device to punish 'an offence against the court and against the administration of justice'," arose when the defendants violated an injunction against their selling liquor. The District Court imposed on each defendant a fine of $500 and costs and three months' imprisonment, and "this sentence was pronounced by the court as a punishment for *contempt* in refusing to obey * * * [the] writ of injunction * * *." *Id.* at 32. (Emphasis added.) This Court, speaking through Mr. Justice Miller, held as follows:

> "Whether an attachment for a contempt of court, and the judgment of the court punishing the party for such contempt, is in itself essentially a criminal proceeding or not, we do not find it necessary to decide. We simply hold that, whatever its nature may be, it is an offence against the court and against the administration of justice, for which courts have always had the right to punish the party by summary proceeding and without trial by jury; and that in that sense it is due process of law within the meaning of the Fourteenth Amendment of the Constitution."
>
> *Id.* at 39.

The attorney general has misapprehended the significance of the *Eilenbecker* decision: there the Court merely held that contempt of court may be punished without trial by jury. Whether imprisonment for contempt of court constitutes "civil arrest" at all is highly debatable but in any event the case stands for nothing at all on the question of body execution, simply because imprisonment for debt did not have even the remotest connection to the issues before the Court.

The attorney general's error becomes even more manifest when he directs the Court's attention to *Fisher* v. *Pace*, 336 U. S. 155 (1949), and *Green* v. *United States*, 356 U. S. 165 (1958), as support for the continued vitality of the *Eilenbecker* holding. In the *Fisher* case the petitioner was convicted of contempt in a Texas state court. On certiorari this Court said that "historically and rationally the inherent power of courts to punish contempts in the face of the court without further proof of facts and without aid of jury is not open to question [* * * Fn. 2. *Eilenbecker* v. *District Court* * * *]" *Fisher* v. *Pace*, 336 U. S. 155, 159 (1949). Similarly, in *Green* v. *United States*, the petitioners were convicted of contempt in the United States District Court for the Southern District of New York. In the course of the Court's opinion Mr. Justice Harlan observed that

> "The following are the major opinions of this Court which have discussed the relationship between criminal contempts and jury trial and have concluded or assumed that criminal contempts are not subject to jury trial under Art. III, §2, or the Sixth Amendment * * * *Eilenbecker* v. *District Court of Plymouth County* * * *."
>
> *Green* v. *United States, supra*, at 183, n. 14 (1958).

In short, the attorney general's reference to *Fisher* and *Green* only confirms the evident, namely, that contempt of court is one matter and imprisonment for debt another, and that the *Eilenbecker* decision treats only the former.

All that has been said applies as well to *Matter of Reeves* v. *Crownshield*, 274 N. Y. 74, 8 N. E. 2d 283 (1937), relied upon by the attorney general on pages 8 and 9 of his brief. There the New York Court of Appeals said that

> "The Legislature has seen fit to provide a creditor with a direct remedy for the collection of his just debts.

> A refusal to recognize such an order by the judgment debtor entitles the creditor to move to have him punished for *contempt*. Without this right, there would be no power in the court to enforce its order. To compel the judgment debtor to obey the order of the court is not imprisonment for debt, but only imprisonment for disobedience of an order with which he is able to comply."

Id. at 79, 8 N. E. 2d at 285. (Emphasis added.)

Again, then, the attorney general has chosen a decision dealing with contempt in the hope that somehow it contributes to a discussion of imprisonment for debt. That our present controversy does not in any wise concern itself with contempt of court should hardly have to be mentioned, and petitioner respectfully suggests that the *Eilenbecker*, *Fisher*, *Green*, and *Reeves* decisions are totally inapposite to the issues before the Court today.

Moreover, *Lipman* v. *Goebel*, 357 Ill. 315, 192 N. E. 203 (1934), from which the attorney general quotes on pages 9 and 10, merely construes section 12 of article 2 of the Illinois Constitution, which forbids imprisonment for debt, to exclude judgments rendered in tort actions. Obviously the *Lipman* holding has no bearing on the federal constitutional questions before the Court in the present case, first, because the federal Constitution does not contain a specific prohibition against imprisonment for debt, and second, because in *Lipman* the Supreme Court of Illinois did not even purport to consider imprisonment for debt in the light of the Eighth or the Fourteenth Amendment. And *Harrison* v. *Caudle*, 141 S. C. 407, 139 S. E. 842 (1927), mentioned on page 9, might as well have been relied upon by petitioner, for in that case the court said that

> "The equal protection of the laws guaranteed by the [state] Constitution is not violated where there is a classification which rests upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed."
>
> *Id.* at 416, 139 S. E. at 845.

There is a constitutional difference between exempting women from the rigors of body execution and exempting persons on account of financial ability.

Finally, *Tatlow* v. *Bacon*, 101 Kan. 26, 165 Pac. 835 (1917), holds that a statute prescribing body execution does not contravene the Constitution, but the persuasiveness of the decision on the cruel and unusual punishment issue is hardly enhanced by its reference to *Light* v. *Canadian County Bank*, 2 Okla. 543, 37 Pac. 1075 (1894); the *Light* opinion did not even mention the Eighth Amendment ban.

We respectfully contend that the attorney general has failed to cast the slightest doubt upon the validity of petitioner's contentions.

Conclusion

For the reasons expressed above and in petitioner's brief, the judgment below should be vacated as repugnant to the Constitution of the United States.

Respectfully submitted,

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